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November 1947

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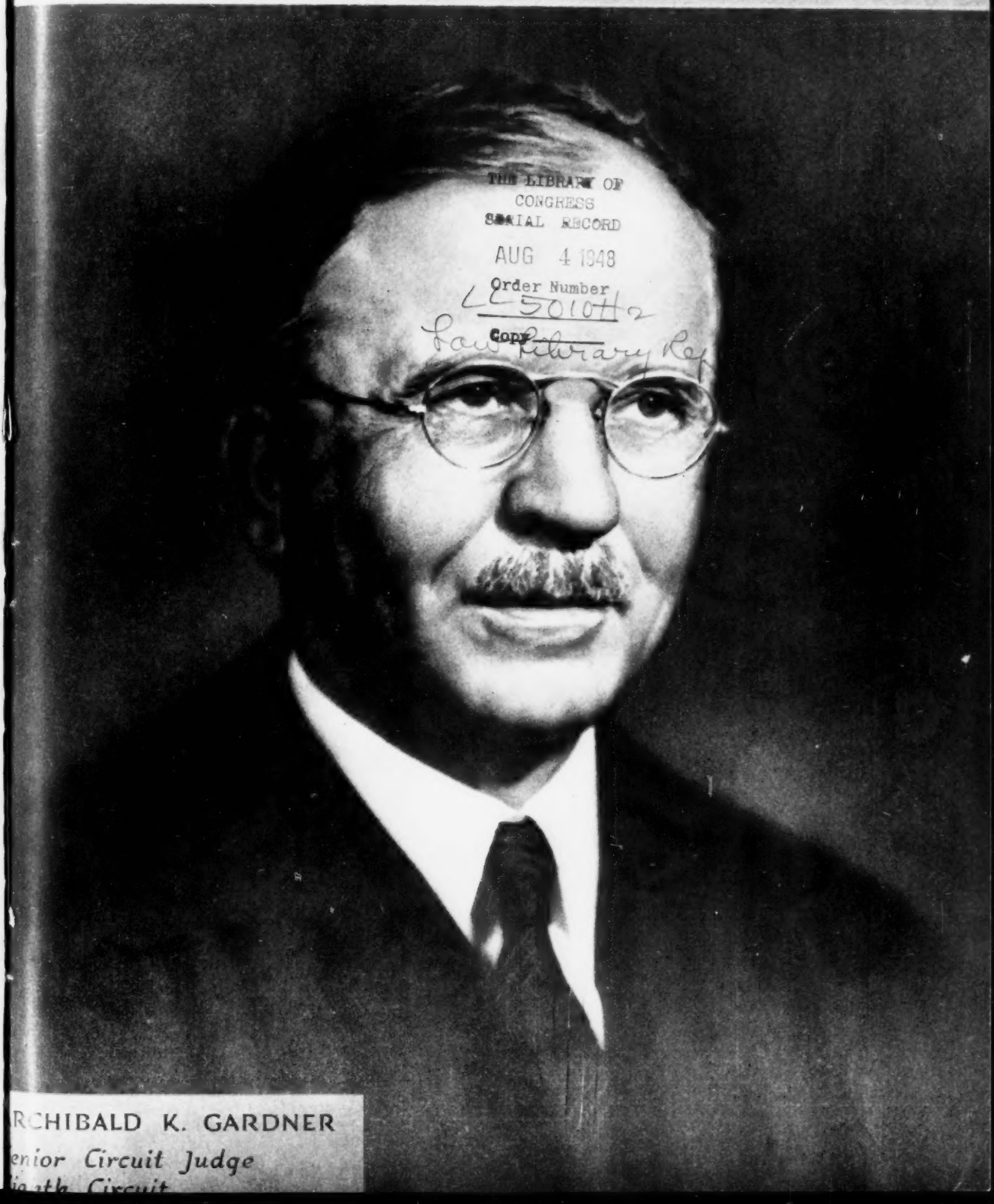

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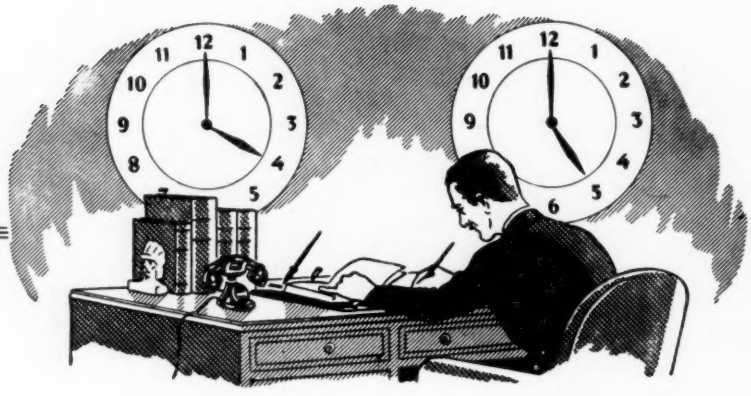

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Contents

NOVEMBER, 1947

THEY CAN'T LIVE ON MEMORIES

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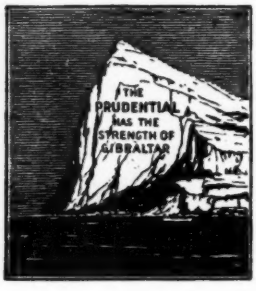

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In This Issue

(Continued on page V)

Lawyers

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capacity by a judge who soon will be eighty, that is news. When a new Senior Circuit Judge is a rugged, hard-working lawyer of "the old school", equipped by many years of general practice in a small city plus more than eighteen years of tested experience in the Circuit Court of Appeals, that is good news for the Bar and the public. Our cover portrait and interesting sketch this month are of Archibald K. Gardner, of Huron, South Dakota, who has succeeded the beloved Kimbrough Stone, of Missouri, as Senior Circuit Judge of the Eighth Circuit.

The Award of the Association's Medal for 1947 **11**

E. J. Dimock writes of the award of the Association's Gold Medal to the Editor-in-Chief of the JOURNAL for conspicuous services to American jurisprudence. The bestowal took place at the Annual Dinner in Cleveland.

Lawyers Should Help as to the Draft "Condemnation Rule" **12**

The Advisory Committee on Federal Rules of Civil Procedure asks for the assistance of the Bar in perfecting the draft which it has submitted for criticism and comment, for a federal "condemnation rule" to govern the fixing of compensation for the taking of private property. Questions are presented which lawyers should dig into and on which they should make known their views before January.

The Tenth Circuit Conference Invites Many Lawyers **13**

Irreconcilable conflicts of view as to summary judgments have arisen between the Circuit Courts of Appeals for the Second and Tenth Circuits and in the Court for the Second. The Judicial Conference for the Tenth "got down to brass tacks" on these and other subjects helpful to the Bar. This issue contains also the interesting proceedings of the Conference for the Eighth Circuit, presided over by its new Senior Circuit Judge Archibald K. Gardner, of South Dakota, and of the proceedings of the Conference for the Fifth. These complete our reports of the 1947 Judicial Conferences in the Circuits.

The Rise and the Restraint of the "Veto" Power **20**

Believing that the time has come to acquaint American lawyers with the story of the veto and to assess clearly the role played by the United States and the Soviet Union in its genesis, Louis B. Sohn puts together informatively the record, and also analyses various pending proposals to limit the veto or the abuse of it, strengthen the General Assembly by creating a "little Assembly," and follow the new avenues of approach opened by the Americas in the Treaty of Rio de Janeiro (published in full in our October issue, page 1058).

Notice by the Board of Elections

Attention is directed to the notice by the Board of Elections appearing on page 1127, with regard to the nomination of State Delegates for three-year terms in eighteen jurisdictions, and for filling vacancies in three jurisdictions. Nominating petitions must be filed with the Board of Elections not later than April 9, 1948.

Candidates for Hearing Examiners May Apply

The U. S. Civil Service Commission announced on October 21 the conditions of its examination or competition for the appointments as Hearing Examiners under the Administrative Procedure Act. We give the gist of these on page 1106. "Outsiders" are not barred and incumbent Examiners and other agency employees are not expressly "covered in," they appear to be given a good deal of an "edge." Those interested may obtain application blanks. Much would depend on the spirit and intent of the administration of such regulations as the Commission announces. Perhaps the convening Congress will take steps to effectuate the Act by assuring a competition fully open to qualified "outsiders" of judicial temperament.

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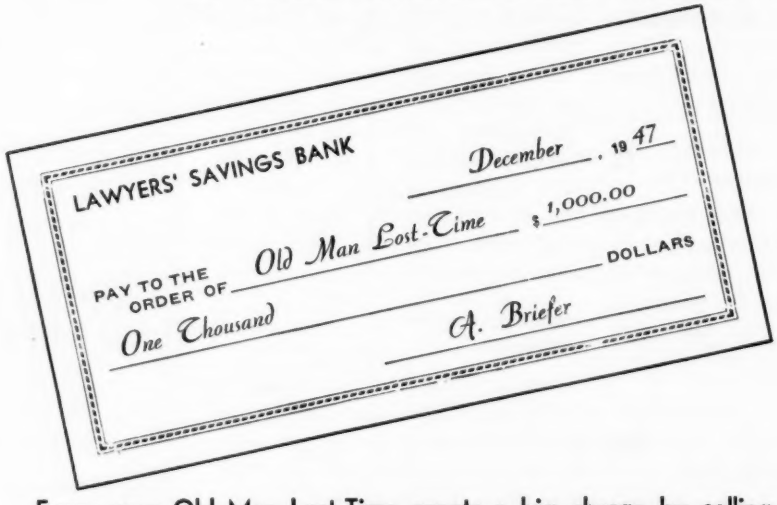

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Survey of the Profession:

Council and Director Announce Definitive Plans

■ Here is one of the most important announcements we have been privileged to publish for the profession of law, in all its branches, throughout America. It deserves your careful reading in entirety, and then your decision that you will assist and advance the Survey in every way you can.

For the reasons stated, this Survey of the Profession of Law is important to you, to all your brethren of the law, and to our country. We of the Bar need mightily to find out the facts about ourselves, learn where our "weak spots" and our failures are, and put ourselves in the best possible position, as an organized profession, to do our utmost for America in the troubling times that are ahead. We cannot afford to fall short of our public responsibilities, we cannot afford to neglect or fail any of our own brethren of the Bar—their problems, their needs, their security. We cannot afford to have "weak spots" or rankling sense of neglect anywhere. In crucial hours, the future of American institutions may depend on the alertness, vigor, unity, and leadership of its organized lawyers. To "put our own house in order" to do our part in meeting great issues which are upon us before we are ready for them, we need first to find out the facts about ourselves. The Survey points the way.

■ Members of the Council for the Survey of the Legal Profession who were in Cleveland devoted Sunday, September 21, to discussing, completing and formalizing the over-all plans and to assigning specified subdivisions of the Survey to the charge of designated consultants.

Much of the prefatory work had been done and agreed on through correspondence and exchange of memoranda among members of the Council and the Director. Those in attendance in Cleveland were: Judge Orie L. Phillips, Chairman of the Council; Dean Arthur T. Vanderbilt, Director of the Survey; Dean Albert J. Harno, Secretary of the Council; Howard L. Barkdull, William Clarke Mason, Carl B. Rix, and Reginald Heber Smith.

Members of the Council unable to be present at this meeting were John W. Davis, Dr. John S. Dickey, Paul G. Hoffman, and Carroll B. Shanks. All actions taken will be submitted to them before they become final.

The composition of the Council was completed by the election of James E. Brenner, of the Stanford University Law School, Palo Alto, California, and of President Tappan Gregory *ex officio*. They thereupon attended. All parts of the United States and many angles of the profession are now represented in the Council.

Independence of the Survey

The *independence* of the Council and the Survey is plain to the members of our Association, but it is here stated again for the information of all lawyers in the United States, whose cooperation will shortly be sought, as well as the information of the public who will follow its developments with interest.

The clear and unequivocal statement printed in the May, 1947, JOURNAL (33 A.B.A.J. 423) merits repetition:

> The Survey will be conducted as an independent project in the interests of the profession and the public by the Director and the staff which he selects, and will go forward with the advice of the Council. The relationship of our Association is that it perceived the need for finding out the facts as to our profession, arranged for the financing of the Survey jointly by the Carnegie Corporation and the Association, sponsored the selection of the Council from among lawyers and non-lawyers with outstanding qualifications, and committed the project to the independent judgment of this distinguished body and the Director chosen by it. With these steps of organization completed in April, the Survey and its results are completely in the hands of the Director and Council.

There are "no axes to grind" except to find and face the facts, whatever they may be.

Spadework Necessary to Cure Dearth of Basic Data

This Survey cannot be an "ivory tower" scholastic job. The brutal fact

is that even the most elementary data for an appraisal of the contemporary legal profession in America simply do not exist. By contrast, there is almost a superabundance of quantitative and qualitative material concerning the medical and engineering professions. Obviously, it is high time that the *facts* about lawyers and their work, their needs and their status in their States and communities, be ascertained.

When one considers the wealth of information available in almanacs, statistical summaries, treatises, and encyclopedias, on almost every other subject conceivable, the paucity of data as to our profession is shocking.

The *Statistical Abstract of the United States,* just published by the United States Government, does not contain the word "lawyer" in its index. Digging through the heading "professional" finally unearths the 1940 census figures, which show that there were then about 180,000 lawyers and judges. This compares with 140,000 clergymen, 237,000 doctors and dentists, and 1,076,000 teachers.

The *Information Please 1947 Almanac* gives some data on "Average Net Income in Selected Professions", but the latest figures are six years old and most of them are ten years old or older.

In the truly monumental statistical compilation and analysis entitled *America's Needs and Resources,* published recently by the Twentieth Century Fund, one finds whole chapters on the costs of medical care, hospitalization, cost of nursing, etc. In the text and accompanying tables, legal expenses by consumers are put under "Household Equipment and Operation"; and the subheading for the item we seek is "Financial and legal expenses". The text says: "Legal charges are a small proportion of the total expenditures for household equipment and operation". (Pages 182, 183). Yet this invaluable book honestly strives to construct a budget of what the American family does spend and ought to spend if it is to live normally!

The authors allow nothing for legal expenses by the American consumer simply because there is no possible way today to arrive at an intelligent figure. They have no trouble in telling us how much families and individual consumers pay for medical care, arranged by income groups; and they do not hesitate to present a table showing "Number of Physicians, Nurses, and Dentists Available for Civilian Service in 1941 and Number Needed to Provide Adequate Service in 1950 and 1960". (Pages 251, 266).

Similar factual information as to the legal profession must be assembled as speedily as possible. Every lawyer in every community has a stake in helping to remove this handicap now resting on him and on all of us.

Enlisting Cooperation of ALL Lawyers in Getting the Facts

The accumulation of adequate and trustworthy data will be impossible unless the cooperation of *all* American lawyers, whether members of Bar Associations or not, can be secured.

To reach nearly 200,000 lawyers and judges inevitably means questionnaires. This method can be highly effective. Modern techniques have removed most of the objections to the old-fashioned questionnaire—that "instrument of torture".

There is reason to believe that men today will respond and indeed are anxious to respond. It is the spirit of the times. As an illustration the Harvard Law School Committee on Legal Education sent out a very complicated and searching questionnaire aimed primarily at finding out what lawyers actually do for their clients. To answer properly was a three-hour job, on the average. The questionnaire was sent to a "sample set" of graduates selected simply by taking the tenth name on each page of the Alumni Catalogue. To its great surprise, the Committee was overwhelmed by letters from graduates who had not been queried and who demanded a chance to give their information.

Profiting from this lesson, the AMERICAN BAR ASSOCIATION JOURNAL sent out its fairly elaborate questionnaire in 1946, not to a selected list, but to the 40,000 members of the Association. More than 10,000 replies, together with hundreds of still more valuable supplementary letters, were received. Today we think the response to such a questionnaire as to the JOURNAL would be still larger by far.

Specific Plans by the Council for Getting Information

The Council plans a questionnaire to be sent to every lawyer in the United States for whom a mailing address can be found. This first questionnaire will do little more than make sure that the name and address are correct, ask the simplest questions, such as age, education, present position (in active practice, etc.). It will tell the recipient about the purposes and objectives of the Survey. Then it will ask: "Are you willing to cooperate with us by answering further questionnaires?"

Thus there will be enlisted and mobilized a loyal battalion of lawyers, in all parts of the country, of all ages, practicing alone and in firms, in great cities and in small towns, and of differing types of law practice and different income levels.

To such a group further inquiries can be addressed, and from their replies can be constructed as accurate a picture of the contemporary profession as, in the nature of things, is possible.

Lines of Council Approach to a Unitary Study

While the problem to which the Survey is addressed has many facets, it actually is an indivisible whole. For that reason all contributing studies must be synthesized by one mind which can perceive the interrelations, the hierarchy of importance in the parts, and where controlling forces fuse and blend or are in conflict and need harmonization. That is the final task of the Director of the Survey.

Divisions of the Survey are convenient methods of approach, and they are the only humanly possible methods. Since the general basic data are unknown, the attack must be

from the periphery inwards. There are recognized authorities and specialists in different fields of professional activity. Also, some fields—considered in and of themselves—are fairly well organized.

The Council, at its meeting in Cleveland, used legal education and legal aid for illustrative purposes or, if you prefer, as "chopping blocks". Both have a recorded history; both have reliable (even if partly incomplete) statistics. Those interested in each field have their respective national associations, where they meet, discuss, and share experiences. Thus both have a literature and an emerging philosophy or *raison d'etre*.

By adding part to part, the whole will begin to take form, although there is strong reason to believe that, as with all vital bodies, the whole will be found greater than the sum of its parts.

Five Major Divisions Decided on for Survey

Five major divisions have been tentatively decided on by the Council and Director. As reported to the Assembly by the Director of the Survey on September 24:

> The first is the professional service of the Bar; next comes its public service; and third its judicial service. To achieve these three great objectives of the profession requires lawyers with high standards of competence, integrity and professional responsibility as well as with reasonable economic security. These considerations suggest the fourth and fifth topics of inquiry, namely, fourth, professional competence and integrity and, fifth, the problem of the economic security of the profession.
>
> Without attempting to go into all of the subdivisions of the five major lines of inquiry, it will be helpful to point out the chief questions that we will seek to answer under each main head. In dealing with professional service we will seek to show objectively what the lawyer does, who needs professional assistance, and whether these needs are being met adequately.
>
> Under the second heading of professional service, we will inquire into what public service the lawyer owes to the citizen in the protection of his fundamental rights; to the Courts, in the selection of judges and juries, and in the administration of justice; to the legislatures, in the improvement of statutory law and regulations having the force of statutes; and to the administration of government, in such matters as personnel, policies, and procedures; and to the community, the state, and the nation in all other activities promoting the public welfare. Here we believe it will be most revealing to report the contributions made by members of the Bar to all kinds of public service to an extent that is not realized by the public nor matched by any other profession.
>
> Under the third heading of judicial service, we will consider whether the judicial system is adequate to the needs of present-day life, whether the judicial processes are adequately suited to modern society, and whether the facilities for judicial service are compatible with the service required in an era of rapid change.
>
> Coming to the fourth major source of inquiry, dealing with professional competence and integrity, we must ask whether the modern system of legal education prepares lawyers for their professional responsibilities. We must also find out whether good material is encouraged to enter the profession as well as whether the undesirable is weeded out. We must determine what are the proper standards of conduct and how well they are maintained. And we must note whether the profession has protected the public interest against the lay practice of the law.
>
> Finally, in dealing with the economics of the profession, we must ascertain how the methods of professional service affect its cost to the client. We must determine whether there is a reasonable relationship between present costs and minimum necessary costs in administering the judicial process. We must see whether or not the services of lawyers are as widely availed of as they might be. And finally we must inquire as to whether the profession has given sufficient consideration to activities promoting the economic security of the Bar, if it is to do its full duty to its clients and with respect to public service and judicial service.

ORIE L. PHILLIPS

Working Staff for the Survey Under the Director

The five major divisions will be further subdivided into topical fields of manageable compass. In this way the skills and knowledge of many men who have devoted years of study and reflection to different problems can be harnessed.

For example, the major division of "professional competence and integrity" involves, among other things, legal education, pre-legal education, post-legal education (continuing education of the Bar), Bar examinations, codes of ethics, grievance committee work, etc.

The lawyer put in charge of each topic will be called a *consultant*. He will be responsible for assembling the facts, evaluating them, and writing a report. It is expected that many of these reports will be published as separate monographs. While their primary objective is to inform the Director for purposes of his own final report, many of them should prove to be invaluable contributions. Those not published will be preserved, so that they may always be available to scholars and research workers.

The consultant will also be the chairman of a committee or captain of a team. He will be an expert in his field; and he will group about him other experts in that field, for all the assistance they can give. He will keep in touch with the actual workers in that field. Where the nature of the topic requires, he will be given research assistants.

The main body of the research, however, will be headed up and done in and from the office of, and under the supervision of, the Director of the Survey.

Correspondents in Each State To Be Selected for Each Topic

Following the successful cooperative method used in drafting and perfecting the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, one or more correspondents will be selected *in each State* for each topic.

This will give third-dimensional strength and accuracy. The correspondents will produce evidence as to what exists, what is good, what is bad, in their own jurisdictions. The consultant's draft report will be submitted to them for corrections, criticisms, and suggestions.

Opinions and Criticism of Informed Laymen Sought

Every effort will be made by the Council and Director to gain the benefit of criticism, information, and opinions by informed laymen. This is in line with Governor Earl Warren's address before the Section of Judicial Administration in 1946 at Atlantic City on "Cooperation with Laymen: A Practical Program Needed by the Profession" (33 A.B.A.J. 101; February, 1947), and with the efforts of Chief Justice Bolitha J. Laws and Chief Justice Robert G. Simmons in that field.

It follows the plan of the judges of the Tenth Judicial Circuit who invited the editor of the *Rocky Mountain News* to address their conference on "The Layman and the Courts". The learned jurists characterized it as "one of the most timely, forthright and far-reaching utterances they had ever heard" (32 A.B.A.J. 621; October, 1946). The 1947 Conference in the Tenth Circuit, and the other Circuits, resorted to the same method for obtaining an objective "outside view".

The attitude of laymen towards the legal profession may be examined and tested by talking to "the man in the street". There is a new science of checking public opinion; as, for instance, in the *Fortune* polls.

The doctors have been finding out that while the individual person has great trust in the individual doctor, the collective public has great distrust of the collective medical profession. The same may be true of us. We must find out. If it be so, then the reasons for the distrust must be determined and, if possible, removed.

Even the Survey Will Be But a Beginning

Obviously this Survey will take time. It will do surprisingly well if it can tell us "whence we have come, where we now are, and whither we are going."

The effort will be to give us an up-to-date picture of what the lawyer does do, fails to do, and ought to do, in contemporary America—and against the background of world events. The facts can be faced—whatever they are—if they are known to us.

Even so it will be only a beginning. It is bound to be followed by studies in many directions. These, by borrowing one from another, and by building one on another, can erect a splendid superstructure of reliable information and illuminating analysis.

But these can soundly and profitably be undertaken only if they can be based on a sure foundation of the objective facts. It is the task of the Survey to supply that foundation.

A Militant Profession Is a Supreme Need of Our Country

And to what does it all add up? Why this supreme effort? Is it merely or mostly to find out about law practice, clients, fees, economic needs of lawyers old or young, ways of improving legal education, and the like, important as those facts are?

No; the basic objective goes far deeper and is much more challenging and indispensable. The American ideals, traditions, ways of free government and of liberty and opportunity under law are denied and challenged today, in the world and in our own land, more dangerously than ever before. "The blue chips are down" as to the things in which we believe—the things which are essential to our existence as an independent profession.

And the future of our country may depend on the kind of leadership its organized lawyers can give. The spearhead of totalitarian efforts to destroy the rule of law is always aimed, and is everywhere aimed now, at the Courts and the lawyers. Freedom has been rooted out and the dignity of men and women has been destroyed in lands where once independent Courts abdicated to political power or "administrative discre-

tion", or were denied by more forceful means their mission of fearless, impartial justice—lands where the vigor and courage of the profession of law were first undermined and then taken away. The American Bar Association can and should be the rallying-point of leadership which will invigorate the profession and sound a clarion call to the people. To build strongly and soundly a militant profession for the sake of our country and its people, the Survey seeks first to gather the needed facts as to the profession of today.

Professor Brenner a Member of the Board of Editors

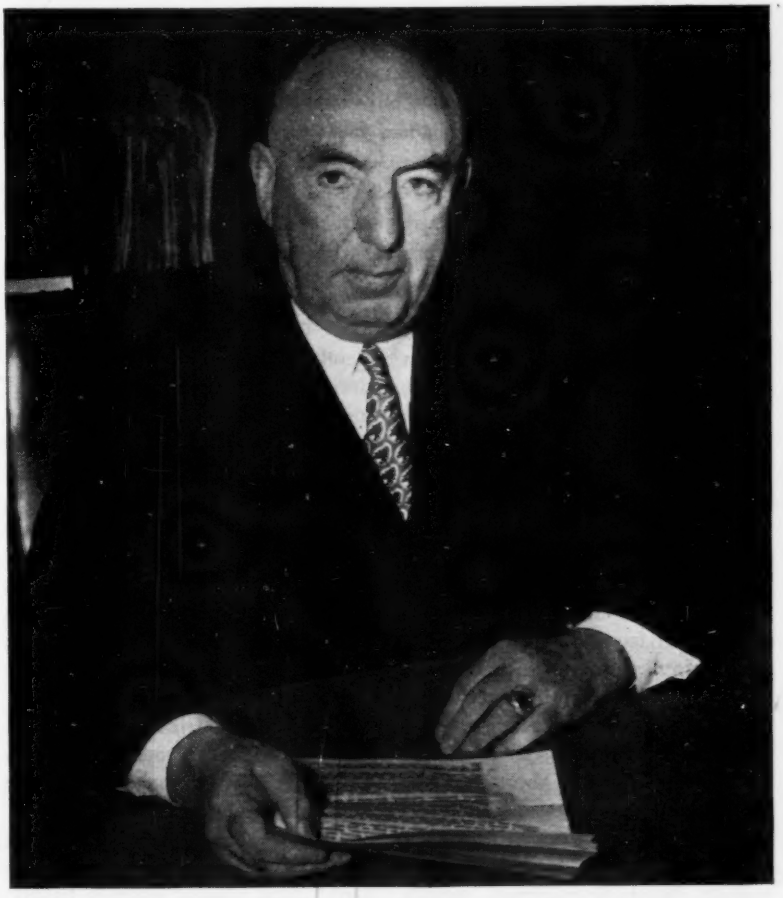
▪ The Board of Editors of the JOURNAL is honored to announce that Professor James E. Brenner, of the Leland Stanford University Law School, Palo Alto, California, has accepted election to the Board of Editors for a five-year term to end with the adjournment of the Annual Meeting of our Association in 1952. He was unanimously elected by the incoming Board of Governors at its meeting in Cleveland on September 26, to fill one of the two new places created by the action of the Assembly and House in adopting the amendment of the Association's By-Laws drafted and filed for that purpose by the Board of Editors (See 33 A.B.A.J. 784; August, 1947). Announcement as to its filling of the other post is deferred until our December issue.

The election of Professor Brenner gives representation again to our great West Coast constituency and also to the teaching profession in the law. Born in Rensselaer, Indiana, in 1889 and educated at the United States Naval Academy, he was in the Navy in World War I, obtained his J.D. degree from Leland Stanford University in 1927, and was admitted to the California Bar in that year. In 1929-30 he was executive secretary of the State Bar of California, of which he has been research secretary since 1930. He was law librarian of Leland Stanford in 1927-32 and entered its law faculty in 1928. He was recalled to active duty in the Navy as a Lieutenant-Commander in May of 1941 and was promoted to the rank of Captain in 1944.

Professor Brenner became a member of our Association in 1932, and has long been a trusted adviser and active participant in many phases of its work, particularly as to legal education and standards for admissions to the Bar. He is the secretary of the National Conference of Bar Examiners and the West Coast member of the independent Council which is initiating the Survey of the Contemporary Legal Profession. He moves up to the Board of Editors from the representative Advisory Board of the JOURNAL.

The Board of Editors welcomes most heartily this accession of ability, experience, judgment, and representative character. Supplementing the valued counsel of our Advisory Board, Professor Brenner's participation will give a broadening base for the work of the JOURNAL.

The Board of Governors re-elected Eugene C. Gerhart, of Binghamton, New York, of the Junior Bar and our returned veterans, as a member of the Board of Editors for a five-year term.



JAMES E. BRENNER Elected to the Board of Editors and to the Council of the Survey of the Profession (see page 1075)

2

70th Annual Meeting:

"High-Lights" of Enjoyable Cleveland Sessions

■ With the attendance, interest and earnest purpose plainly back at pre-war heights, the 1947 Annual Meeting, held in Cleveland, Ohio, on September 22-26, reflected further the great upsurge in activity and spirit that has been manifest in the work of the organized Bar since the ending of hostilities in World War II. Because of the excellence of the facilities and arrangements, the high quality and importance of the program and the actions voted, and the hospitality of Cleveland lawyers as hosts, the 70th meeting will be long remembered as most enjoyable by those who were so fortunate as to be able to attend. Because of its inspiriting and unifying effects on the Association's work and workers for the new year which began with the adjournment in Cleveland, Incoming President Tappan Gregory and all those who are associated with him in the leadership and direction of the Association's activities have abundant reason for gratification that this gathering gave them so auspicious a transition to 1947-48, which in turn will come to climax in another great meeting in Seattle, in Washington State, the week of September 6.

■ The registration of Association members at the Cleveland meeting was 1960. Although this was not as large a number as was attained in several years before the war, the impression prevailed that this was in fact one of the Association's larger meetings. Registration figures are not on a basis comparable with those recorded before the war. When no registration fee was charged by the Association, it was the practice of the host Bar Associations of the locality and State to induce a large registration of members from the vicinage, in order to record a large attendance. Nowadays those members register who have to make use of the Association's facilities for obtaining hotel reservations, dinner and luncheon tickets, etc.; and the local registration consists chiefly of members who are active in the Association's work or are serving on local committees. Certainly in Cleveland the attendance at session meetings of the Assembly and of the Sections, and at the annual dinner, suggested that this was a large meeting of our Association.

Sessions of the Assembly were held in Cleveland's commodious Public Auditorium, which also was the meeting place for many of the Sections. The House of Delegates met in the Hotel Cleveland, which housed also the Association's headquarters. The first meeting of the Assembly was convened at 10 o'clock on Monday morning, September 22; the final adjournment of the Assembly took place at noon on Friday, September 26. President Carl B. Rix presided at all sessions of the Assembly until the closing minutes.

Distinction was given to the program and the social occasions of the week by the presence of the Chief Justice of the United States, Fred M. Vinson, of Kentucky; the Lord Chancellor of Great Britain, Viscount Jowitt, and Lady Jowitt; Chief Justice James C. McRuer, of the High Court of Ontario, and Mrs. McRuer; the Honorable John Foster, M.P., of England; Mr. Justice Harold H. Burton, of the Supreme Court of the United States; many judges, United States Senators and Members of Congress, federal and State officials of high rank; and deans of law schools and teachers of law, as well as Association members from all parts of the United States. The registration included lawyers from every State in the Union, and every State was represented in the House of Delegates, which recorded a total of 175 delegates.

The Annual Dinner
A Delightful Occasion

The Annual Dinner on Thursday evening had an attendance of 930, which was "capacity" for the Hotel Statler. Aside from the brief presentation of the Association's Medal, and the introduction of Incoming President Tappan Gregory, the sole speaker was the Lord Chancellor of Great Britain, who was heard with keen interest. His address will be in our December issue. The dinner was

concluded at an early hour, and the common verdict was that the occasion had attained its old-time spirit and distinction.

The Annual Address, delivered by President Carl B. Rix on "Law and Government", featured the opening session of the Assembly. It was published at page 985 of our October issue. A great audience in the Public Auditorium that evening heard Chief Justice Vinson discuss "The Age of Great Challenge". His address is elsewhere in this issue. A notable event in the Assembly sessions was the exposition of the present-day role of two branches of government with Chief Justice McRuer, of Toronto, speaking as to the independence of the judicial department in Canada and other countries of the British Commonwealth; and Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary, presenting the enhanced function of the legislative branch under a constitutional republic. Chief Justice McRuer's address is elsewhere in this issue. Another feature was the statement of Dean Arthur T. Vanderbilt, of the New York University School of Law, who was to have spoken on the role of the executive and administrative branch of government, but who changed his topic in order to give the Assembly information as to the progress of the Survey of the Legal Profession. His remarks are quoted from in the leading article in this issue.

The Sections Contribute Vital Programs and Discussions

Practically all Sections of the Association reported attendance and participation at or above pre-war levels, with especial interest in the new Sections of Administrative Law and Labor Relations Law, whose forums were on subjects of the liveliest current interest to lawyers. As usual, the Section programs were a most valuable part of the overall program for the Annual Meeting; they induced the attendance of many outstanding speakers on subjects in their respective fields. Members encountered their usual difficulties, however, in making selection from among the many attractive Section programs in progress simultaneously on Tuesday; but it would of course be impracticable to "space" the Section meetings over a period of time which would avoid overlappings.

A solution may be to set all Section meetings for days immediately before the opening sessions of the Assembly and the House of Delegates, as has been done by the National Junior Bar Conference and the National Conference of Commissioners on Uniform State Laws.

Among the many noteworthy addresses under Section auspices may be mentioned that of Mr. Justice Burton, before the Judicial Section, on "Judging Is Also Administration", which is elsewhere in this issue; that of Congressman John W. Gwynne, of Iowa, before the Section of Administrative Law, on future legislation as to the Administrative Procedure Act; those of General Counsel Robert N. Denham of the NLRB, before the Section of Administrative Law and the Section of Labor Relations Law, the first of which is summarized in this issue; and the address of Under Secretary William C. Foster, of the Department of Commerce, before the Section of Patent Law, which we expect to publish in an early issue, along with some other addresses and papers before Sections, if space permits.

The lively proceedings of the National Junior Bar Conference are reported in the department devoted to "Our Younger Lawyers".

House of Delegates Copes With a Congested Calendar

Aside from the transaction of a large volume of business on its calendar, a feature of the sessions of the House of Delegates was the impressive statement made by former President Jacob M. Lashly, of Missouri, concerning his recent visit to Bar organizations in Europe. His report is discussed in this issue by President Tappan Gregory, in "The President's Page". The Resolutions adopted by the House of Delegates as to the United Nations, international law, abuse of the "veto" power, and the legal aspects of American foreign policy, are reported elsewhere in this issue.

The House of Delegates had hard-working sessions for the dispatch of its business, under the leadership of Chairman Howard L. Barkdull, of Cleveland, with Secretary Joseph D. Stecher, President of the Ohio Bar Association, reporting for the Board of Governors. Serious consideration is being given to suggestions that certain types of reports by Sections and Committees be required to be made to the mid-year meeting of the House, rather than to the Annual Meeting, where the time is less than sufficient for their consideration. Various Sections and Section Councils meet in connection with the Annual Meeting, some of them after it is under way; and they do not complete and submit their recommendations in time for considered action by the House during the next two or three days.

The House was the scene of several animated debates and close division. Amendments of the Association's Constitution and By-Laws (see page 781 of our August issue) were voted; their consideration took much time.

The deliberations of the House truly had the spirit and the characteristics discussed in the editorial on "The Confrontation of Opinions", in our October issue (page 1021).

On many matters, the House manifested independence and open-mindedness, as well as its thoroughly representative character. Few, if any, actions were voted merely because they had been recommended by the Section or Committee in charge of the matter. Much time was necessarily given to Association "housekeeping" and finances, in view of the sharply increased costs of carrying forward Association activities and the enforced selection of projects to be undertaken or emphasized. Our usual summary of the proceedings of the Assembly and the House is being prepared from the stenographic transcript and will be published in a subsequent issue.

The nomination and election of eleven Assembly Delegates to the House of Delegates is reported separately, elsewhere in this issue.

In the minds of those present at the sessions in Cleveland, there appeared to be an ascendant but troubling sense of realization that in our own country and in the world the traditional institutions of law, non-political Courts, an independent profession, and scrupulous regard for the rights of individuals against "pressure" minorities and selfish majorities, are in danger from "the police state", the disposition of Courts to assume legislative powers for themselves and for bureaucratic agencies, and the infiltrations of Communist philosophies and agents. Practically every speaker sounded this warning and urged some course of resisting action by the Bar.

The whole meeting itself was a demonstration of what is possible only under the institutions of freedom and would be inconceivable in a "police state". Men of strongly opposing views came together, stated their opinions forcefully, disagreed with others emphatically, accepted majority decisions good-naturedly on such matters as came to a vote, and went away still holding and advocating their own opinions save as they may have been moderated by the views of others. No better or more timely exemplification could have been given of what an independent profession under a free government can and does mean, than the assembling and deliberations of this great convention, at a time when so much of the world denies the truth of Abraham Lincoln's fundamental American truism that "No man is good enough to govern another man without that other's consent".

The consensus manifest in the meetings was that among the chief bulwarks of defense against the "police state" and the Communist ideology are competent and fearless Courts faithful to the law, an independent profession alert in defending the American constitutional system and the vitality of the constitutional guarantees of the rights of men, and an aroused public opinion which strongly opposes every yielding to collectivist concepts and makes unceasing war on whatever individuals, organizations and groups openly or covertly espouse or assist the destructive and despairing philosophies. There were many evidences of a renewed determination that our Association shall do all it can for these great ends.

3

Striking Sentences from Our Cleveland Meeting

"I have to appoint the judges [of all British Courts]. . . . I am in the best position of anybody to carry it out because . . . I sit and hear cases, and hear these fellows perform. . . . I have never let political considerations weigh with me to the slightest degree in trying to get the fittest man. I have never appointed, incidentally, a member of my own party. . . . And I have never appointed a judge without getting the willing approval and concurrence of my brother judges who sit and staff the particular division to which I am going to appoint this judge."

—The Lord Chancellor of Great Britain (Viscount Jowitt)

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"Perhaps the most striking evidence of the confusion of our time is the conception of the nature of man which forms a part of many widely-held ideologies. Under this view, man is . . . bereft of dignity, capable of responding only to the grosser of materialistic motivations and irrational passions. . . . Unfortunately it underlies the thinking of some in our own midst who shrink from its inevitable and logical conclusions."

—Chief Justice Fred M. Vinson

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"The new social justice is to take from the diligent and give to the indigent."

—Frederick C. Crawford, in "The Layman Looks at the Lawyers"

"Some labor organizations have indicated an intention or desire to boycott the [Taft-Hartley] Act and to refuse to utilize the services of the Board, but many more of them are of the opinion that they cannot get along without the Act and the Board. In this I think they are correct. Labor organizations now exist in a highly competitive field. Many of them are decidedly "big business"; but if big business were denied the protection of the Courts in its legitimate operations it would soon become the prey of the smaller elements which enjoy such protection, and can attack and raid it with impunity. Industrial peace and harmony will not be promoted if this division is allowed to persist. It can only be maintained if all of organized labor will utilize the Act and services of the Board to the fullest. The Act was created with that as its objective. Labor still is its chief beneficiary."

—Robert N. Denham, General Counsel of the National Labor Relations Board

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"Lawyers must organize the economic system so that it will be the servant of the people and not their master."

—Senator Joseph C. O'Mahoney, of Wyoming

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"We shall never win in war again if we wait until after the beginning of war to make our preparation."

—Cyrus R. Smith, Chairman of the Board of American Airlines, Inc.

"You and I must be ever vigilant in seeing that the [Administrative Procedure] Act is administered in accordance with its true intent and spirit. In certain quarters, this law was not greeted with shouts of 'welcome'. Some agencies admitted that the proposed legislation was good 'for the other fellow'. . . . Care must be taken that subsequent legislation shall not repeal or whittle down the provisions of the Act."

—Congressman John W. Gwynne of Iowa

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"The gracious Lord Chancellor sounded a rather gentle note of warning in his speech, slightly different from the trenchant words which he used to me in private exchange before we came into this hall, when he said, perhaps a little more accurately: 'You are going to have a hell of a time following Rix!' "

—Incoming President Tappan Gregory

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"We keep up our traditions. We all like them. They do no one any harm. But you must not judge us from any normal standpoint at all."

—The Lord Chancellor of Great Britain (Viscount Jowitt)

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"Drunken driving has turned the Nation's highways into treacherous short-cuts to hospital and morgue. The American bench and Bar are not making the record they should in checking this menace to safety."

—Senator Wayne Morse of Oregon

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"The eyes of the world watch each test of the constitutional structure of the United States. The keystone of that structure is its independent judiciary. It remains for that judiciary to fit its actions so perfectly to the needs of each opportunity that they will strengthen the case for a government of laws as the best guaranty of human liberty."

—Associate Justice Harold H. Burton

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"The law blunders along with only precedents of the past as our guide for the future. . . . The law center is designed to help adapt law to this atomic era. The law school cannot answer the challenge alone."

—Dean Robert G. Storey, of Texas

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"During the war the Judge Advocate General's department was the finest law firm in the world."

—Major General Thomas H. Green, Judge Advocate General of the United States Army

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". . . Reason, unadulterated, shows the way to truth and justice, and man-made laws should reflect the same. Our job is to refine human law. When reason goes berserk, we get dictatorial trends unless we have in healthy operation the system of checks and balances —not simply in government but in the hearts of men."

—Senator Alexander Wiley of Wisconsin

"My conclusion is that regulation is not the method to achieve the objective [as to the radio, press and motion pictures]. An an alternative, I would urge that if the American Bar Association feels that it is of sufficient importance, and I think it is, a program be developed which will permit constructive co-operation between the media of broadcasting, the press and motion pictures that will have some chance of success. . . . I think it is the moral obligation of the American Bar Association, if it chooses to complain and criticize communication media, to suggest and provide leadership for a program that will utilize these channels of public information for the worthy purposes of which they are capable. We shouldn't just complain when there is opportunity and duty to act."

—Paul Porter, former Chairman of the Federal Communications Commission

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"The foundation of your Nation rests on the declarations of the rights of the individual as a free man. The right to live under the rule of law administered by an independent judiciary is one of the lamps of freedom. The legal profession must keep that lamp trimmed and burning brightly. . . . Human beings who live in society have a right to live under law made for them by constitutional process deriving its ultimate authority from the people. Once the law is made or declared, the right of free men is that it be administered for and applied to all the people without discrimination in any degree, by a judiciary that is not only free and independent in fact but also thinks and acts with freedom and independence."

—James C. McRuer, Chief Justice of the High Court of Ontario

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"I am very hopeful that this enterprise [Survey of the Legal Profession] will enlist the support of at least as many lawyers as collaborated on the work of the Federal Rules. If we can obtain that kind of support I feel quite sure that by this cooperative method we can produce a survey which will not only be of tremendous value to the profession, but will be of immeasurable value to the public in bringing home to them just what are the strong points of the work of lawyers and, equally, what are our weak points, for we do have our weak points, to the end that we and they may cooperate in overcoming them."

—Dean Arthur T. Vanderbilt, Director of the Survey of the Legal Profession

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"My experience is now so considerable that I can say that a judge cannot function as a judge unless he has a free, independent and fearless Bar who fight for their clients, but fight with the weapons of the soldier and not with the weapons of the assassin."

—The Lord Chancellor of Great Britain (Viscount Jowitt)

4

Age of Great Challenge:

Chief Justice Vinson Tells Its Dangers and Needs

■ On September 22 in Cleveland our Association welcomed and heard the Honorable Fred M. Vinson, of Kentucky, for the first time as Chief Justice of the United States. His address dealt with "The Age of Great Challenge" and did not refer to the Supreme Court or its work. As to our own country, as well as the world in general, he sketched factors which operate to make the present an era of crisis and challenge, and made an earnest plea for the revival of American qualities through which the challenge to the supremacy of law and human rights can be overcome. He especially stressed the need for a reawakened sense of spiritual values, faith in our institutions and way of life, confidence that this crisis can and will be overcome as others have been. He emphasized the especial responsibility of lawyers to resist the undermining of law and respect for law. Chief Justice Vinson's address follows in full.

■ At some point in the distant future, scholars poring over the history of our time may well label the days through which we are passing as The Age of Great Challenge. There can hardly be a thinking person in our country today who has not experienced the sense of urgency and crisis which our age envisions. The challenges cannot be ignored. They confront us in every aspect of human activity—in the political and economic, in the social and intellectual, and in the moral and spiritual realms.

Fundamental values upon which we have erected the edifice of our civilization are under attack. Our very successes in responding to the challenges of our time have bred new crisis and new challenge. Thus, confronted with the military might of the Axis, we rose to meet that test. In achieving success, we have fallen heir to the grave problems growing out of a postwar world in need of physical and spiritual rehabilitation. Our age gives striking confirmation to the observation of Mr. Justice Holmes that "Repose is not the destiny of mankind".

The symptoms of this age of crisis are many and familiar. Perhaps the most striking evidence of the confusion of our time is the conception of the nature of man which forms a part of many widely-held ideologies. Under this view, man is a mere automaton, incapable of sharing in the determination of his own destiny, bereft of dignity, capable of responding only to the grosser of materialistic motivations and irrational passions. That such a creature is incapable of exercising the high privilege of self-government is obvious. Essentially this conception of the nature of man underlies all of the totalitarian doctrines of our day; and, unfortunately, it underlies the thinking of some in our own midst who shrink from its inevitable and logical conclusion. This conception contains the seeds of destruction. We must resist it and prove it fallacious.

Anarchy or Dictatorship as Alternatives to Rule of Law

But we see evidence of crisis elsewhere. We are confronted with the challenge of the weakening of the family and the loss of the spiritual values growing out of the strong family bond. As lawyers, we have been made disturbingly aware of a growing lack of faith in and respect for law and the legal process. After the first World War, the ideal of the supremacy of law was subjected to successful attack in many countries with the result that the legal systems of those nations abdicated their high functions and in cynical subservience served the demands of all-powerful states. But the challenge to the supremacy of law has not been confined to the totalitarian regimes. In our own country we have seen evidences that there are those who have failed to realize that the only alternative to the supremacy of law is anarchistic chaos or the reign of a personal dictator.

We need not explore the symptoms of our age at greater length. We are all conscious of their existence; they confront us at every turn.

They confirm the proposition that we are, indeed, passing through The Age of Great Challenge.

An Age of Challenge Is an Age of Opportunity

An age of great challenge is an age of danger and difficulty, but it is also an age of great opportunity. Though the hazards are real and menacing, the opportunities for great achievement are correspondingly enhanced. Rarely in human history have men been accorded so high a privilege and so appalling a responsibility. The release of atomic energy, for example, is fraught with dangers which could spell the doom of our civilization; but it also creates opportunities for advances in human welfare never before contemplated.

As lawyers, we have been accorded peculiar privileges and, therefore, we have inherited peculiar responsibilities. Perhaps no group in our society is in so favorable a position to observe and to contend with the challenges of our day. It is entirely appropriate, therefore, that we from time to time should give particular attention to the problem of how we may intelligently respond to the challenges that confront us, and then go forth to meet the demands of our age.

Errors in Methods of Meeting the Challenges

Men react to challenge in many different ways. In every age of crisis, there are those, for example, who react by attempting to escape or to ignore challenge. Those persons live in the vain delusion that by avoiding responsibility and shrinking from the struggle they may find peace and security. In the words of Mr. Justice Holmes, they exist under the peril "of being judged not to have lived."

We cannot escape the challenges of our time. Failure to respond in the face of crisis results in quite as positive consequences as the courageous assumption of responsibilities. A policy of drift can lead only to disaster. I would leave this thought with you: "He who lights a candle is better than he who curses the darkness."

There are also those who react to challenge by rigidly opposing all change and all innovation. There are others who reject all the methods and techniques of the past and find virtue only in the new. Frequently, such persons are sincere and well-intentioned. They are aware that the civilization which they value is under attack. The one group attempts to preserve and defend it by insisting that, in a changing world, the old institutions shall remain unchanged and inflexible and that the old forms of action shall remain unaltered. The other group reacts by insisting upon the precipitous abandonment of the entire legacy of the past without adequate consideration of the consequences. Both groups make the error of failing to distinguish between the essential values of their civilization and the transitory forms by which those values are given expression. They fail to realize that by insisting upon the use of outmoded techniques or by indiscriminately rejecting all that is old, they make impossible the effective defense of the foundation rocks of their civilization which are essential and timeless.

Constructive Ways of Meeting and Overcoming the Crisis

But there are other more constructive ways in which to react to the crisis of our time. We need, first of all, to reaffirm our faith in the fundamental values upon which has been based all that is worthwhile in our society. We need to revitalize our conviction that that society is best which gives the greatest practical recognition to the dignity of individual man and which affords greatest opportunities for the development of the higher potentialities of all men. We need to develop the same high sense of personal responsibility which led the early American statesman, George Mason, to write: "The debts we owe our ancestors we should repay by handing down entire those sacred rights to which we ourselves were born." We need, finally, to devote our full intelligence and greatest efforts to the task of devising ways and means whereby those essential values can be given their most complete expression in a world of flux and change.

Perhaps the greatest hazard which besets us today is the danger of losing faith in ourselves. In the face of the crisis of our time, some may be tempted to doubt the adequacy of human capacities to contend with the challenges which confront us, to fear for our ability to defend and preserve our civilization—our way of life. Such fears are irrational, but their consequences can be grave. The courage and sacrifice of our people in time of war mounted the heights. Courage and sacrifice were the paramount ingredients of the miracles of production on the home front and the heroic deeds on land, sea, and in the air. The courage and sacrifice of our sons and daughters in the face of death should shame us for our fears today. "Courage," 'tis said, "is fear that has said its prayers." And sacrifice, to paraphrase Emerson, is the real miracle out of which all the other miracles grow. We must be alive and alert to the problems of a shaken world; we need not be mercurial in arriving at quick conclusions as to the efforts to solve our problems; we must have patience, tolerance and understanding. We need always to keep a sense of proportion. The problems we face are human problems and therefore are capable of human solution.

Faith in America and Our Form of Government

We should recall that this is not the first period of crisis and challenge in which the American people have found themselves. Our Nation was born in crisis. It was founded upon a political ideal held in hatred and contempt by the rulers of powerful and hostile nations. We too easily forget the fears and doubts which must have beset the minds of those who had pledged their "lives and sacred honor" to the task of founding a government by the people in the face of internal dissensions and external opposition. We have recently celebrated the 158th anniver-

4 Age of Great Challenge

sary of the adoption of the Federal Constitution. During the long period in which our National Government has been functioning, there has not been a generation which has been free from crisis and challenge.

Our fathers emerged from those struggles in the past with added strength and wisdom. Our children —and their children—demand no less of us. The courage and sacrifice necessary for us to keep faith with them must be grounded on the conviction so well expressed in the opening lines of "An American Creed," written by a great contemporary, Cardinal Spellman:

> I believe in America:
> In her high destiny under God to stand before the people of the earth as a shining example of unselfish devotion to the ideal that has made us a great Nation: the Christian ideal of liberty in harmonious unity, builded of respect for God's image in man and every man's right to life, liberty and happiness.

With this faith in our country, with a spirit of understanding, courage and sacrifice, we may be assured that The Age of Great Challenge will usher in The Age of Great Achievement.

5

Opening Conference Held on Lawyers' Participation as Citizens in Public Affairs

■ The first public activity of the new Association year was the Conference on the Citizen's Participation in Public Affairs, convened in the Wedgewood Room of the Waldorf-Astoria in New York City on September 29 and 30, under the joint auspices of the American Bar Association, the American Political Science Association, and the Law School of New York University. President Tappan Gregory presided at one session; Last Retiring President Carl B. Rix, at another; President Arthur W. McMahon of the Political Science Association, at a third session; and Dean Arthur T. Vanderbilt, at two sessions.

The occasion marked the inauguration of the Citizenship Clearing House established by the New York University Law School. It signalized also the opening of our Association's program under its newly-created Committee on Lawyers' Participation as Citizens in Public Affairs (see 33 A.B.A.J. 696; July, 1947, issue). Nine members of the Committee were present from Texas, Georgia, Oklahoma, Pennsylvania, and Florida, as well as from New York.

The program was of diversified and sustained interest, and the addresses were by men of distinguished service and experience in public affairs. Judge Robert P. Patterson, former Secretary of War, was one of the speakers at the session on the National Government; U. S. Senator and Former Governor Raymond E. Baldwin, of Connecticut, at the session on State Governments; former Mayor Thomas L. McKeldin, of Baltimore, at the session on the citizens' participation in local government; and Judge Douglas L. Edmonds, of the Supreme Court of California, at the session on "Educating the Citizen." The addresses and the lively panel discussions were looked on as providing much material for future conferences and the work of our Association's Committee.

The members of the Committee are the following: Woodall Rodgers, Dallas, Texas, Chairman; Victor Davis Werner, New York, N. Y., Vice-Chairman; George E. Brand, Detroit, Mich.; Kenneth F. Burgess, Chicago, Ill.; Donald K. Carroll, Jacksonville, Fla.; Paul B. DeWitt, New York, N. Y.; Charles E. Dunbar, Jr., New Orleans, La.; Mrs. Frances Craighead Dwyer, Atlanta, Ga.; James D. Fellers, Oklahoma City, Okla.; Richard K. Gandy, Santa Monica, Calif.; Dean Erwin N. Griswold, Cambridge, Mass.; Dean Orlando J. Hollis, Eugene, Oregon; Stephen E. Hurley, Chicago, Ill.; Chancellor Robert N. Hutchins, Chicago, Ill.; William A. Lane, Miami, Fla.; Edwin Luecke, Wichita Falls, Texas; Harold R. McKinnon, San Francisco, Calif.; Mayor James Quigg Newton, Jr., Denver, Colo.; Elliot Norquist, Kansas City, Mo.; Congressman Albert L. Reeves, Jr., Kansas City, Mo.; Mrs. M. Louise Rutherford, Harrisburg, Pa.; Joseph D. Stecher, Toledo, Ohio; Dean Robert G. Storey, Dallas, Texas; Charles P. Taft, Cincinnati, Ohio; and Dean Arthur T. Vanderbilt, Newark, N. J.

Because of his great interest in the creation and work of this Committee, Last Retiring President Carl B. Rix will, at the request of President Gregory, continue in a close relationship to the planning and activities of the Committee.

6

The Judicial System:

Its Independence Essential to Free Government

by **James C. McRuer** • Chief Justice of the High Court of Ontario

■ Representing the judicial branch of government in an informative discussion in the Assembly in Cleveland, Chief Justice McRuer, of the High Court of the Province of Ontario, lately President of the Canadian Bar Association, gave an incisive and forthright address on the role and function of the judiciary in a present-day constitutional government. He traced the rise of the Anglo-Saxon concept of the independence of the judiciary and the necessity that judges shall be in fact courageous as well as competent and aloof from political or public-policy considerations. Although his observations were expressly limited to the judicial system of his own country and other members of the British Commonwealth of Nations, they have manifest implications for all lands where liberty and law are cherished and rights of the individual citizen are looked on as a heritage to be protected by independent Courts against invasion by executive or legislative powers of government. He warned against the dangers inherent in the surrender or subordination of the Courts to political considerations naturally stressed by administrative agencies and legislatures, and he expressed the earnest hope that the lawyers of the United States will continue their cooperation with the Bar of Canada in behalf of the establishment of the rule of law in the international community as well as the preserving of the supremacy of impartial, fearless justice in our respective countries.

■ We are somewhat inclined to think of our respective systems of law and government, as something that we can take for granted. However, on objective reflection, I am not sure this is altogether true. When we view the disordered condition of the world today and consider what has been responsible for that condition, it would not seem inappropriate for a body of lawyers on this continent to give some critical thought to their governmental way of life, recall its history, and consider its future.

My discussion is colored by the point of view of one who not only claims but places high value on his inheritance in the British common law and British tradition. Some aspects of the subject are common to your country and mine, and some may not be so common. The essential principles of judicial process are substantially the same.

Those principles cannot be properly understood without examining the foundation on which they rest. Our judicial system, like all other forms of government, has been one of evolution and growth. We have a legal theory in British tradition that the King is the foundation of justice and that we, the King's Justices, dispense justice on the King's behalf. This constitutional principle which has grown to be of such paramount importance in protecting the rights and liberties of the subject, undoubtedly did not have such a wholesome origin. As trial by ordeal gave way to forms of early judicial process, all but the most serious crimes could be atoned by payments of various kinds. Criminal justice was a source of revenue and in pre-Norman and early Norman times the King found it advantageous to reserve to himself and his officers certain classes of cases. The right to try cases had a marketable value, a fact of which the King was quite conscious.

During the two centuries that followed the Conquest the duty of administering justice was conferred on itinerant justices who later became known as Commissioners of Assize. This was the origin of the system of judicial circuits in England which is followed in all of the common law provinces of Canada and is substantially followed in the Province of Quebec.

So closely do we in Ontario follow the pattern drawn over 700 years ago that the appellation applied to these early Courts is used today. The precise wording of the proclamation of the Court crier at the opening of our

Courts of Assize each day, upon the presiding Justice taking his place on the Bench is:

> Oyez, Oyez, Oyez: All persons having anything to do before my Lord the King's Justice of the Supreme Court of Ontario at its sittings of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery draw near and give your attendance—God Save the King.

The flavor of the old Norman French is preserved in this proclamation.

Origin and Early Rise of Independence for the Judiciary

While our judicial system was designed in its early history to serve the people of the realm by placing justice within the reach of everyone, that history shows that where the interests of the King and justice conflicted, the King's Justices were under the direct domination of the King. But the seed of an independent judiciary had been planted. Its growth has not been free from interference in the past and there may be influences that still will seek to retard or limit its future development.

Until the Act of Settlement passed in 1700, judges of England held office *"durante placeto"*. During the reign of Charles I it was demonstrated how easily the King's pleasure could terminate the tenure of office of a judge whose judgment was not agreeable to the King. The Revolution and the Restoration did not change this. Lord Hale, whose name adorns early jurisprudence, was succeeded by a Scroggs and a Jeffrey. Of this time Holdsworth says: "It was quite certain that a Judge who was both learned and honest would hold his seat on the Bench by very precarious tenure". A pamphlet issued in 1685 by the Marquis of Halifax addressed to Charles II, attacking the judges, said: "Obedience shall be looked upon as a better qualification in a Judge than skill or sincerity".

The notorious Jeffrey's speech as Lord Chancellor, to Herbert when he was made Chief Justice of the King's Bench, reflects what was expected of Judges in those times:

> Be sure to execute the law to the utmost of its vengeance upon those that are now known and we have reason to remember them by the names of Whigs; and you are likewise to remember the snivelling Trimmers; for you know what our Saviour Jesus Christ said in the Gospel that "They that are not for us are against us."

King James II is recorded as having told Thomas Jones, when he dismissed him from the post of Chief Justice of the Common Pleas, that he was determined to have twelve judges of his opinion. It is to the credit of the lawyers of those days that the King found difficulty in securing one of real ability who would accept appointments to the Bench under such conditions.

Cromwell was just as conscious as the Stuart Kings of the control that could be exercised over judges by a power of dismissal. Chief Justice Rolle of the King's Bench seems to have resigned under pressure because of the displeasure he caused by listening without interruption to the argument of counsel who challenged the constitutional validity of the Instrument under which Cromwell purported to govern the country.

Inborn Power of Human Race To Resist Arbitrary Injustice

The inherent power born in the human race to resist arbitrary injustice found expression in two revolutions, the second of which resulted in the Magna Charta of the British judicial system—the Settlement Act. The operative part covers little more than half a page in the statute books. It consists of eight sentences, one of which reads as follows: "That after the said limitation shall take effect as aforesaid Judges, Commissioners, be made *Quamdiu bene se gesserint*, and their salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them."

This same statute contains a recital that expresses a fundamental principle deeply embedded in our system of jurisprudence:

> And whereas the laws of England are the Birthright of the people thereof, and all the Kings and Queens who shall ascend the throne of this Realm ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same.

This is a declaration of the supremacy of law as distinct from the supremacy of arbitrary power, whether exercised as a royal prerogative or under a claim of parliamentary privilege.

The one step necessary to place the judges in a position of complete independence was to exempt them from the rule ordinarily applicable to all office holders whose commissions would be voided on the demise of the Crown. By Act of Parliament, I George III, Chapter 23, all doubts as to whether this rule was still applicable to judges were set at rest.

The independent position gained by the Courts after the Revolution restored their efficiency. The judges now had nothing to fear from either the Crown or Parliament. They could be removed only by joint action of the two branches of the legislature and were free to develop the principles of constitutional law as freely and as impartially as they were accustomed to develop principles in the other branches of English law.

Conclusions from the Development of the Judicial System

Three things emerge from the historical development of the judicial system in British countries:

1. The King is the fountain of justice, but he does not dispense justice except through his judges.

2. Once the King has clothed a judge with the power to dispense justice, that judge is beyond the control of the King or Parliament, except that he may be removed for cause upon Address of both Houses of Parliament.

3. The King is the titular head of the state, the executive and Parliament acting only according to law.

Full Independence of Judges in Britain and Canada

A British or Canadian judge knows no master in the discharge of his judicial duties. He is entirely independent of the King who appoints

him; he is equally independent of the executive that recommends his appointment; he is not accountable for his decisions, but only for his good behavior. Parliament may by statute render his decisions ineffective, but it has no power to direct them. It matters not who the suitor may be—be he rich or poor, small or great, or be he the Government or even King himself—the freedom of the judge on the bench to discharge his public duty is untrammelled. He is accountable to his own conscience and that alone, and I can assure you that in Canada a vigorous public opinion demands that this be so.

I suggest that the lawyers of our respective countries should guard with vigilance that which our profession won with such courage in the past—the independence of the judges.

Independence in Final Decisions in Constitutional Cases

While in Canada there has been some discussion arising out of difference of opinion as to the meaning of our Constitution, there has never been marked conflict between the legislative or executive branch of government and the judicial. It may be that in some degree this is because final decision has been in the hands of the Judicial Committee of the Privy Council, which is removed from the changing atmosphere of local Canadian opinion. While there may be at times difference of legal opinion in Canada as to the correctness of final decisions in constitutional cases, their independence is recognized and never questioned. This in itself makes for stability of thought in constitutional matters and suggests that we should maintain the same degree of independence in our mental approach to these cases as to all others.

Not infrequently it is argued that appeals to the Judicial Committee should be abolished because, it is said, members of the Committee do not understand local conditions in Canada. It is hoped that if the right to appeal to the Privy Council is taken away, it will not be implied that the Canadian Courts will be so influenced by so-called local conditions as to be less limited in their exercise of independent judgment than the members of the Judicial Committee have been.

Judges Should Not Be Influenced by Political Policy

I quite recognize the fact that there may be and often is an honest conflict of judicial philosophical viewpoint in the approach to any legal problem. It is right that there should be, but there is no place in our legal thinking for the suggestion that the philosophical view of the judge on the bench should be affected by the political policy of the executive or legislative branch of government. I entirely agree with the statement: "The rule of law is in unsafe hands when Courts cease to function as Courts and become organs for the control of policy." But it must never be forgotten this statement has a twofold application: While the judge has no right to interpret the law for the purpose of limiting or controlling the policy of the government in power, neither has he the right to color his interpretation of the law by a desire to advance its political interests.

When the judge goes on the bench he must learn to think independently and to decide independently. But independent thinking does not mean thinking in a vacuum. Judicial decisions apply to living people and may be, and often are, molded by an honest judicial viewpoint of the public welfare. But that is a very different thing from submission to the straightjacket of political policy as expressed by a party in power or out of power.

Decisions Should Not Experiment or Trifle with Political Theories

Political currents change rapidly with the passage of time. The rule of law cannot be advanced by judicial recognition of the immediate course of those currents. The science of law transcends the emotional appeal of politics. It calls for the exercise of judicial wisdom as well as the application of judicial learning. Its interests are best served by applying to new combinations of circumstances those rules of law which are derived from legal principles and judicial precedents, and in developing their application in a manner consistent with the stable advancement of civilization. There is no place in judicial decision for experiment or trifling with political theories, be they new or old.

Many may feel that much that I have said has not the same application to constitutional cases as to others, and that something of a lesser degree of judicial independence is not only permissible but desirable in cases involving the interpretation of the Constitution under which we live.

In Canada, there has been some ebb and flow in the tide of legal opinion on the subject matter of federal and provincial rights under the provisions of the British North America Act. When the Courts have appeared to lean toward federal power, the provincialists protest, and when decisions appear to advance the provincial cause, the federalists make speeches and write long theses. But nowhere does one find responsible opinion demanding that the letter of our Constitution be distorted by judicial decision and its documentary language "twisted, disregarded or 'interpreted' to the despair of original intent in the service of what the Judges conceive to be the inherent nature of our Constitution."

Constitutional Decisions Should Not Take Account of Political Consequences

Not infrequently in Canadian history much criticized constitutional decisions in circumstances unforeseen when they were rendered have been later relied upon to support an entirely new public opinion. This leads one to the conclusion that the interests of the science of law demand that decisions in constitutional cases, as well as all others, be based on logical interpretation founded on reason, without consideration for political consequences. Democracy has broad powers to change the con-

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Crisis in Foreign Policy:

House of Delegates Votes an Emphatic Stand

■ When our Association convened in Cleveland on September 22, grave issues as to the United Nations, aid to Greece and non-Communist Europe, abuse of the "veto" power in the Security Council, and the sharp divisions between the Soviet Union and its few satellites and the great majority of the Members of the United Nations, were coming to the fore. A comprehensive Report by the Association's Committee for Peace and Law Through United Nations was given a preferred place on the Calendar of the House of Delegates. The submitted Resolutions were adopted without negative votes except on one minor issue that presented only a question of internal policy as to the form of action by the Congress.

Our Association's action which attracted widespread attention at the critical juncture, was reported on the first page of the New York *Times*, and was given much space in other newspapers. In the conference of delegations in the General Assembly of the United Nations, some of the proposals received early consideration, as reported in press dispatches from Lake Success. The emphatic stand in behalf of effective steps to the end that, as the Committee put it, "the power of the great majority of the Member Nations to act together to outlaw war, prevent and punish aggression, and provide for the peaceful settlement of provocative disputes, shall be assured beyond doubt," was widely commended and endorsed. Members of our Association will be interested in noting the text and recommendations of the Committee's Report of September 17 and the actions voted by the House on September 24, in the light of subsequent developments in the foreign policy of the United States.

■ The Resolutions submitted to the House of Delegates by the unanimous recommendations of the Committee for Peace and Law Through United Nations stressed first two constructive and "heartening" developments within the framework of the United Nations and its Charter—the Treaty of Rio de Janeiro (published in full at page 1058 of our October issue), signed on September 2 by the representatives of nineteen American republics (with the two others to adhere later), and the further steps taken under the auspices of the General Assembly for the progressive development and the eventual codification, of international law.

"The matters dealt with," said the Committee of its Report, "are of the utmost importance to all the people of our country and of the world. The General Assembly of the United Nations re-convened in New York City on September 16, for sessions which seem likely to be decisive as to the future of the existing international organization. The present prospect is that the Congress of the United States will be called in special session in November or December to make decisions on new and urgent phases of the foreign policy of our country and authorize action to effectuate that policy.[1]

"Under the conditions existing in the world today, your Committee is of the opinion that its Recommendations, and the action of our Association through the House of Delegates, should be only such as will support and assist those who, in our Government and in the United Nations, are working earnestly for peace and law, and will help to unite, not divide, American public opinion."

The members of the Committee submitting the Report were: William L. Ransom, of New York, chairman; Frederic M. Miller, of Iowa, vice-chairman; Reginald Heber Smith, of Massachusetts, secretary; George A. Finch, of the District of Columbia; Tappan Gregory, of Illinois; Frank E. Holman, of Washington State; William Logan Martin, of Alabama; Judge Orie L. Phillips, of Colorado; M. C. Sloss, of California; Charles W. Tillett, of North Carolina, and Philip J. Wickser, of Buffalo, New York.

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1. *Editor's Note:* On October 23 the President of the United States issued a call for a Special Session of the Congress to convene on November 17.

Resolution No. 1: Commending the Treaty of Rio de Janeiro in Various Respects

Concerning the Treaty of Rio de Janeiro, the Committee reported to the House, in part:

> Of far-reaching importance is the fact that the Treaty of Rio de Janeiro contains a clear definition of elementary acts of aggression which are outlawed in advance and are not left to *ex posto facto* debate and political action subject to the "veto", as is the case in the Charter of the United Nations. A further gain is the recognition and specific and basic averment that "the American regional community affirms as manifest truth that juridical organization is a necessary prerequisite of security and peace and is founded on justice and moral order." (Preamble).
>
> What has been amicably agreed on and done here to outlaw war, and aggression, assure the settlement of disputes by juridical or other peaceful means, and provide for the common defense against attack, exemplifies what can be done under the Charter. That more than one-third of the Members of the United Nations bind themselves to accept decisions by a two-thirds' vote on actions within that specific and limited field, without a "veto" power on the part of any Nation, may be also a hopeful augury as well as example. The sole limitation on collective action so determined is that no Nation "shall be required to use armed force without its consent" (Treaty, Article 20), by its vote or otherwise.

The House of Delegates adopted unanimously the following resolutions:

> RESOLVED, That the American Bar Association notes with approval the further progress made, within the structure and Charter of the United Nations, at the recent Inter-American Conference for the Maintenance of Continental Peace and Security, held at Petropolis in Brazil, in implementing The Act of Chapultepec and strengthening further the spirit of friendly consultations and of submission to law-governed procedures, as well as the means of united self-defense, throughout the Americas, against aggressions from outside and for the prevention of the causes of disputes and misunderstandings among the Nations of this hemisphere. The Association hails with particular satisfaction the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on September 2 by the representatives of nineteen American republics, as a concrete demonstration of what can be accomplished within the framework of the United Nations, by Nations which are willing to submit themselves to the rule of law and to agree to act together for mutual assistance and defense against aggression clearly defined. The Association commends this Treaty to the consideration of the Delegation of the United States in the General Assembly of the United Nations and to like-minded peoples because of its clear and specific statement and limitation of its scope and purposes and especially its acceptance of the principles of decision by a vote of two-thirds of the Member Nations on major questions (a majority vote on some others), with a party to a dispute between Members excluded from voting on it, no Nation required to use armed force without its consent, and no right or power on the part of any Nation to "veto" or block the defined procedures for the pacific settlement of controversies within the Americas and for united action in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter, against aggression from any source, anywhere within a Continental American zone defined in the Treaty.
>
> RESOLVED FURTHER, That the American Bar Association hails with especial satisfaction the progress made at Petropolis and Rio de Janiero because it has been fostered actively and substantially by lawyers of the Americas, through their respective Bar Associations and learned academies of the law; and that this Association pledges its continued support, through its own activities and its participation in the Inter-American Bar Association, in behalf of the objectives of the Treaty and in behalf of peace, understanding, mutual assistance and self-defense, and the prevalence of the rule of law, throughout the Americas.
>
> RESOLVED FURTHER, That the American Bar Association favors and urges the earliest practicable ratification of the Inter-American Treaty of Reciprocal Assistance by the Senate of the United States.

Resolution No. 2: Pledging Continued Support and Cooperation for the Progressive Development of International Law

The Report of the General Assembly's Committee, as submitted to the Members of the United Nations and now pending before the General Assembly at Flushing Meadows, was summarized in the July JOURNAL (33 A.B.A.J. 727-730) and published in full in the August JOURNAL (33 A.B.A.J. 831-835).

The recommended task was to be entrusted in the first instance, as our Association recommended in 1945, before the San Francisco Conference (31 A.B.A.J. 227-228; May, 1945) and again to the State Department in May of 1947 (33 A.B.A.J. 728; July, 1947), to an International Law Commission of fifteen specially qualified jurists and jurisconsults, who will be nominated by the Member Nations on a basis which will tend to assure that none will name only its own Nationals. The Report contemplated that they will be elected by the General Assembly and the Security Council, in the same manner as judges of the International Court of Justice are elected[2]—this also as recommended by our Association (31 A.B.A.J. 227-228; May, 1945).[3]

The Association's Committee advised the House of Delegates that a statement or codification of the principles and rules of present-day international law, prepared and issued under the auspices of a body elected in a manner generally similar to that in which the members of the World Court are elected "would have great authority and influence among states which were willing to submit themselves to the rule of law in the international sphere, irrespective of its adoption and promulgation as a unilateral agreement having a binding legal force".

The House of Delegates adopted unanimously the following Resolutions:

> RESOLVED, That the American Bar Association expresses its gratification that the General Assembly of the United Nations has before it for consideration and action a notable Report by its distinguished Committee, which submits definitive plans for the progressive development and the eventual statement or codification of the rules

2. See 33 A.B.A.J. 831, 832 (August, 1947) for the recommended provision.

3. Subsequent developments have indicated that an interim commission may be set up to do preliminary work, with the nominations and elections postponed to next year; also that the General Assembly may not include the Security Council in the electoral processes. See the editorial in this issue: "Set-back for International Law."

and principles of international law.

RESOLVED FURTHER, That if the International Law Commission proposed by the Report is authorized by the General Assembly and elected by the United Nations, this Association as an accredited organization long at work in the field shall tender and render to the Commission and the Secretariat such assistance as they desire that this Association shall undertake, through its constituted Committees and Sections as hitherto voted by the House of Delegates and in close cooperation with the Canadian Bar Association, to the continuance of which this Association pledges its best efforts.

Resolution No. 3: Urging United Support of the United Nations

In line with previous declarations by the House of Delegates urging that the United Nations receive united support from the American people and that efforts to strengthen international organization should be undertaken within the framework of the United Nations, the House of Delegates adopted unanimously the following Resolutions:

RESOLVED, That the American Bar Association expresses again its considered opinion to be that the interests of peace, justice and law throughout the world will best be advanced through the continuance of united, outspoken support of the United Nations by the American people, and that efforts to strengthen and extend international organization, cooperation and control of matters which are international in their scope should be undertaken within the framework of the United Nations and on the basis of undivided support of that organization.

RESOLVED FURTHER, That the American Bar Association urges that lawyers and other citizens shall do all they can in their home communities to maintain an informed public opinion in favor of working through the United Nations for accomplishing the great objectives of the Charter and the Statute of the International Court of Justice.

Resolution No. 4: For Assuring to the United Nations the Power to Take Effective Majority Action

Although recognizing that the present critical division among the Nations goes "much deeper than anything that could at present be coped with through amendments of the Charter", the Committee's Report emphasized the need for such steps, through amendment of the Charter or otherwise, as would enable the law-abiding Nations to take effective majority action. The history of the "veto" and the proposals then pending to curb the use of it were reviewed,[4] and a constructive suggestion was offered as to a course of action in the event the Soviet Union and its satellites finally insist that Russia keep and exercise its power to block action by the Security Council.[5] An editorial in this issue discusses an attack made in the General Assembly on this proposal.

Basically, the Report commended for consideration as to other areas the example set by the Treaty of Rio de Janeiro, in which more than a third of the Members of the United Nations agreed on a two-thirds' rule to govern their collective action for security. Concerning what is now known as "the Armstrong Plan" as brought forward by Hamilton Fish Armstrong, Editor of *Foreign Affairs*, the Committee said:

> If amendments of the Charter are not proceeded with and the law-abiding Nations have to consider and decide as to what individual and collective action they can agree on and take, within the framework of the Charter and pursuant to its Article 51, a considered suggestion has been made for a supplementary agreement or protocal, to be effective among the ratifying Nations when two-thirds of them have ratified.

The Committee's Report had been prepared and signed before Secretary of State Marshall made his proposal of September 17 for "a little Assembly" to be continuously in session in the interests of peace. So this proposal was not reported on or acted on.

In response to a question from the floor by Floyd E. Thompson of Illinois, Chairman Ransom stated that the Committee has not at this time recommended the outright abolition and elimination of the "veto" in all matters. The House of Delegates adopted the following Resolutions, without votes in the negative:

RESOLVED, That while the American Bar Association has recognized and urged, at the time of the adoption and ratification of the Charter in 1945 and since, that strengthening amendments in several respects will be needed and should be considered in the light of experience, the Association respectfully submits to the Delegation of the United States in the General Assembly of the United Nations the Association's opinion that at the present juncture there is an especial need that, through agreed-on interpretations of the Charter in the procedural rules or through the formulation and adoption of specific amendments of the Charter if need be, it shall be assured that two-thirds or other substantial majority of the Nations which wish to submit themselves to the rule of law and accomplish the pacific settlement of international disputes can take effective action against aggression and do so within the procedures of the United Nations, beyond the power of a minority to "veto" and prevent the action of such a majority in these respects.

RESOLVED FURTHER, That although the American Bar Association hopes that all Members of the United Nations will accede to the principles of effective action by substantial majorities, such as have lately been accepted by nineteen republics of this hemisphere, all of which are Members of the United Nations, the Association respectfully submits to the Delegation of the United States in the General Assembly the Association's considered opinion that any such amendments, if proceeded with, should be specific and sufficient to accomplish the above-stated purpose, and that consideration should be given to so conditioning their submission for ratification as to make clear the intention of the ratifying Members to put them into effect between themselves if and when they are ratified by at least two-thirds of the Member States.

Resolution No. 5: Concerning the International Trade Organization and Its Proposed Charter

The only division and difference of opinion that arose in the House as to the Committee's recommendations came as to the ITO and its draft Charter, concerning which the

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4. See, also, "The Rise and Restraint of the Veto" (Page 1148 of this issue).

5. See "If Two 'Worlds': What Can United Nations Do for Majority Action?" 33 A.B.A.J. 756-759; August issue; Report of Commission I, adopted by the San Francisco Conference; quoted in 33 A.B.A.J. 758.

8

Annual Survey of Law:

Decisions of Courts Show Some Dangerous Trends

by **Roscoe Pound** • Dean Emeritus of the Harvard Law School

■ When the 1942 and 1943 volumes of the *Annual Survey of American Law* were issued by the Faculty of the New York University School of Law in January of 1946, the *Journal* reviewed them generally, with emphasis on the significance of so monumental a project. (32 A.B.A.J. 104; February, 1946). Printers' delays and difficulties as to paper held back the issuance of subsequent volumes, but those for 1944 and 1945 were published. The 1946 Volume is being distributed at this writing (October 20), so that the *Annual Survey* is now current.

For the information and guidance of judges, practicing lawyers, and law teachers, who may have occasion to refer to and use the *Survey*, we sought a critical appraisal of the competence of its legal scholarship and the soundness and utility of its analyses, summaries, and forecasts of trends. Obviously the legal scholar to undertake such a task for the profession was our beloved Roscoe Pound. He accepted, decided that his review could best be directed primarily to a single intermediate volume (that for 1944), and went to work on his thorough examination. He has been long at it, with his trip to China and his teaching duties interfering; but he has produced a truly monumental review, of which our limited space permits us to publish in this issue only the first installment. The editors of the *Survey*—indeed, all of us—are fortunate that it has such a reviewer and has received such a review.

He has written far more than "a survey of the *Survey*"—something still more important. He has illumined it with his own trenchant analysis and commentary on the trends of decision in American Courts, particularly the Supreme Court of the United States—what he sees as the subordination of private to public law, the whittling away of constitutional guarantees and the Bill of Rights, the abdication and denial of judicial review even where vouchsafed by statute, the acceptance of "spurious interpretations" by Courts and agencies competing with the Congress in the exercise of legislative powers, the rise of administrative absolutism against the rights of persons and property. By no means all of our readers will agree with his solemn warnings, but none can question his authority to speak and the grave patriotic concern which prompts him to say what he does.

A few days after he sent to the *Journal* his formidable manuscript, he left for China by airplane to become legal adviser to the Minister of Justice in the Chinese Government. Many will wish that he had a similar post of honor and opportunity in our own country. His teaching days are over; he retired as University Professor Emeritus of Harvard University—an honored title first bestowed on him. As he sees it, the future of law-governed justice and responsible democratic government in the world, even in our own land, may in the long run depend on what takes place in China, now on the firing-line between freedom and Communism. The rhythm of the Far East, with its centuries of civilization, has a slower beat than that of the West; but China is plainly an immediate battleground in a fateful struggle that is bound to affect the rest of the world. So Roscoe Pound in his seventy-eighth year has gone where the fighting for law and liberty is perhaps the most crucial. A free and law-governed China, with Courts of justice safeguarding the rights of its vast people, would be a great victory for peace and security against totalitarian invasions. The hopes and prayers of American lawyers are with him in his valiant efforts. Meanwhile, we are grateful for the vigorous valedictory which he has left behind him, for publication in the *Journal*.

■ In the seventies and eighties of the last century, before the days of "advance sheets," the *American Law Review*, used to review the English and American State and federal law reports, volume by volume, as they appeared. With the great multiplication of reports, this practice came to an end. Legal periodicals published notes of and comments on recent cases as they appeared in the "advance sheets" of the West Publishing Company's Reporters and of the English Law Reports. Also, at times, legal periodicals would pub-

lish surveys of the progress of the law on certain subjects over a certain time. But these seldom dealt with legislation, nor did they cover the whole field of the law systematically.

In England for some years now, there has been an Annual Survey of the whole field. How much it has been needed for American law one can realize only by going through this volume of the *Annual Survey of American Law* and its two predecessors and seeing what they offer the judge, the practitioner, and the law teacher, who would keep abreast of the materials of our administration of justice. The *Survey* covers not merely judicial decision, but legislation, administrative regulations, annotations in the series of annotated reports, books on legal subjects, and articles and notes in the legal periodicals.

Excellence and Competence of the Selective Work for Its Survey

To select for the *Survey* the cases which are significant out of the great mass reported every year is a formidable task. It has been well performed. The comments upon them are judicious and instructive, and the articles and notes in legal periodicals which call for notice have likewise been well selected and competently summarized. Indeed, a great service has been done the profession. The volumes of the *Survey* will find a welcome place, not only in law libraries, but on the private shelves of judges and practitioners who would know what is going on in the law as a whole as well as in the fields of their immediate interest.

One could wish that the *Survey* might be extended to include decisions, legislation, books and articles of significance for Anglo-American law, from England, Ireland, Canada, and New Zealand. English decisions are currently noted in many American legal periodicals. But if those of general significance as well as legislation and law writing of general importance for the law of English-speaking lands could find their place in a general survey of the law as a whole, the gain for our science of law would be great. The task of a *Survey* limited to the United States is, however, so heavy that we should be grateful for what is given us instead of asking for more.

Judicial decisions often involve a number of points to be classified in different parts of the legal system. Also, the same point may have different aspects according to the place in the legal system from which it is looked at. Hence in a survey of the decisions of a year, the same case may have to be discussed under more than one heading and to be well discussed under any of them may have to be considered as a whole as well as with respect to some particular point. Thus in a survey by subjects there will be a certain amount of unavoidable overlapping. It would require an editor with the eyes of Argus to prevent some repetition. But although the same case comes up at times in a number of different chapters, the repetition in this *Survey* is very little and the views of different writers on the same case are often of value.

There is a strong temptation to review the cases summarized and discussed by the writers rather than the writers' discussion of them. But the function of a review is rather to survey the *Survey* than to resurvey the materials, which indeed is beyond the capacity of one man, not merely because of the bulk of the material covered but because the ground covered is too vast and calls for too detailed acquaintance with too many subjects.

General Features of the Progress of Law Revealed

Before looking at the several chapters in which the cases and materials on particular subjects are discussed, certain general features of the progress of the law as indicated by the decisions of the Courts and by legislation in 1944 may be noticed. For one thing, the influence of the *Restatement of the Law* by the American Law Institute continues to be strong and wholesome. In only one case of the many in which the *Restatement* was cited or referred to was there departure from it, and that was by a federal district Court called on, under the doctrine of *Erie R. Co.* v. *Tompkins,* to apply the common law obtaining in another State from the one in which it was sitting.

Even more significant is the marked preponderance of public and administrative law—of determinations by administrative agencies and officials, affecting everyday rights of individuals over the law applied by the Courts governing private relations. The *Survey* as a whole suggests Jennings' proposition that in the English-speaking world, public law is swallowing up private law.

Extension of Judicial Support to Administrative Absolutism

Also, the reviews of the different subjects seem to reflect a steady growth of extra-legal if not often lawless exercise of official power and rise of official absolutism for which I doubt whether the war was wholly responsible. Instead, I suspect, the war was an excuse for tolerating it. In particular, it is depressing to find the Supreme Court of the United States repeating at this date the *ex post facto* justification of the traditional immunity of sovereignties as required by "unfettered freedom of government from crippling interferences," and so calling on the Courts not to be astute in order to do justice to taxpayers, to give a fair construction to a State's consent to be sued.[1] The dissent of Mr. Justice Frankfurter in this case is in the path of modern law.[2]

But there are currents and countercurrents in the course of decision on matters of public law. On the one hand, there is a steady extension of the powers of the federal government. On the other hand, there is a steady giving up of or refusal to exercise the jurisdiction of the federal Courts as permitted by the Constitution. In connection with the tendency to concede the widest power and freedom from judicial scrutiny to administrative agencies, this sug-

1. *Great Northern Insurance Co. v. Read,* 322 U. S. 47, 54 (1944).
2. *Ibid.* 59.

gests a change in our polity in the direction of centralized absolutism.

Judicial Tendencies to Accept Extreme Administrative Interpretations

In the same direction, the decisions in the federal Courts show a *tendency to extreme interpretations* and to accept extreme interpretations made by administrative agencies. Thus it gives lawyers pause when they are told that the "vicinity" of the New York Curb Exchange is Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, and Ohio. A Circuit Court of Appeals criticized the reasoning of the Commission that gave this interpretation. But it reflected that the "vicinity" of an exchange was not a constant, and considered that the test was whether the exchange could "demonstrate its ability to support an adequate market . . . and the extension of the privilege is required in the public interest or for the public protection." This required the word "vicinity" to support a great deal. It means that a word of plain meaning in ordinary use may be made to mean whatever an administrative agency chooses to make of it.

Again, we are told that a lower Court "could not see" that the words "plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort" covered also "distribution" by a separate entity in no way connected with the agencies of production and with its own plant. But a Circuit Court of Appeals could see that it did. This type of "extensive" interpretation reminds one of the saying of an English lawyer, speaking of interpretation clauses, that the type was a provision that "whenever the word 'cows' occurs in this Act it shall be construed to include horses, mules, asses, sheep and goats."

"Spurious Interpretation Carried to the Extreme"

Five pages of the *Survey* devoted to details of "extensive" interpretation of the Wages and Hours Law show what Austin called spurious interpretation carried to the extreme. In substance an Act purporting to deal with persons employed in interstate commerce is made to cover all who have the remotest connection with any activity with the remotest relation to interstate commerce. For example, workers in an independent laundry, to which the overalls of workers in a plant, the product of of which may get into interstate commerce, are sent to be washed and ironed, are by interpretation engaged in interstate commerce. Why did not the statute, if it meant this, say: "All employees of any kind, employed for any purpose by any one?"

The reason was that to go so far was beyond the power of Congress. If we assume that Congress really intended this, yet it could not put that intent into law. Congress used the language of the Act in order to keep within its powers. By interpretation the Act is made to go beyond the power of Congress. On their face the words keep within it. In their interpretation they take in what is reserved to the States by the Tenth Amendment. This method of interpretation can be used to bring all legislation within the purview of Congressional legislative competence. Insurance is now commerce, and an insurance company empowered to write insurance without restriction to the State of its charter is engaged in interstate commerce. If a life insurance company maintains a legal department, all the lawyer clerks in the office, everyone on the payroll, the stenographers, the messenger boys, the janitors and scrub women, are engaged in "production" in interstate commerce, because they are on the payroll of an insurance company. This is extensive interpretation gone mad.

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Another example may be seen in the "portal to portal" mess which developed later but had its beginning in 1944. Mr. Justice Murphy in *Tennessee Coal & Iron R. R.* v. *Muscoda Local*[3] intimated that the statute as to wages and hours was to be construed as a manifestation of Congressional intent "to achieve a uniform policy of guaranteeing compensation for all work or employment engaged in by employees covered" so that it was immaterial whether there had been "a prior custom or contract not to consider certain work within the compass of the work week or not to compensate employees for certain portions of their work." The fallacy here was in assuming that going to and from the locus of employment is "work" within the meaning of a statute which employed an everyday word in an everyday meaning. The Wages and Hours Administration at once took up this suggestion and applied it. What came of this bit of spurious interpretation belongs to a later volume.

Survey Shows "A Steady Growth of Spurious Interpretation"

Throughout the *Survey* we may see a steady growth of spurious interpretation. Ilbert has noted the virtual abdication of lawmaking power by Parliament as to what he calls "lawyer's law."[4] As to the everyday rights and duties of individuals, the burden is left to administrative agencies and to the Courts to do what the legislature ought to have done or ought to do. But this is only part of the story. There is a fashion of calling all determination according to law "legalism." Extra-legal determinations are made to appear based on or in accord with legislation by a stretching or rewriting process which is called interpretation. By a confusion of interpretation and application, where there is only a question of application of plain provisions, not requiring interpretation, spurious interpretation may be resorted to as application. In this spirit one of the writers in the *Survey* tells us that "a charitable hospital is engaged in trade and commerce." But that is an extravagance of "extensive interpretation" of which the Court cited was not guilty. Such a hospital did sell incidentally to physicians.

Restrictions as to the Bill of Rights Are Disclosed

Along with extreme extensions of the power of the central government, the *Survey* as a whole discloses a tendency, except in cases of race discrimination, to forego or restrict the guarantees of the Bill of Rights to individuals. Thus the guarantee as to self-incrimination is dealt with by the Supreme Court in a way that may foreshadow like restriction of guarantees of due process of law, against double jeopardy, and of indictment by a grand jury. Significant in this connection is the refusal of the Supreme Court of the United States to review decisions on significant and often very important questions. As denial of certiorari is not the same as affirmance, a large margin of uncertainty is left at many points, and rights which deserve to be secured may remain for a long time impaired by decisions of lower Courts.

Also, a policy of restricting removal of causes from State to federal Courts is apparent. Where a federal statute allowed an action to be "maintained in any Court of competent jurisdiction," by 1944 a clear weight of authority had developed to deny removal from, or order remand to, the State Court on the ground that the word "maintained" indicated a Congressional intent to cut off removal. This is a very small basis for what, after all, may be a not undesirable result. But it assumes legislative abdication and a duty of the judiciary to amend statutes freely.

It should be said, however, that the tendencies referred to are little or very much less manifest in the decisions of State Courts during the year. Nor should it be assumed that the critical attitude in which I have considered those tendencies reflects a general critical attitude of the *Survey*. Largely the decisions are analyzed and summarized but left to speak for themselves or with occasional discussion as to their relation to the general law or their confusing effect. The attitude of the *Survey* is one of exposition and restrained criticism.

Comment on the *Survey's* Five Parts—International Law

Coming to details, the *Survey* is divided into five parts: (1) Public Law—In General; (2) Public Law—Social, Business and Labor Regulation; (3) Private Law; (4) Adjective Law; (5) Legal Philosophy, History, and Reform; and fifty-three chapters. The several chapters are uniformly well done, and some are exceptional in presentation and analysis of the material.

Because of preoccupation of scholars with duties involved in the war, restrictions on paper, and difficulties of publication, little basic literature on INTERNATIONAL LAW was published during the year. The writer notes appropriately Hudson's *International Tribunals, Past and Future,* and Keith's new edition of the second volume of Wheaton's classical treatise, which has to do with war. The changes in attitude toward neutrals and their rights during a world war naturally concern an editor of Wheaton. Much that we were taught on this subject at the end of the Nineteenth Century has gone by the board under the exigencies of world-wide conflict, and something more than an edition of and commentary on a Nineteenth Century text is likely to be required. How far development can come from the new World Court and how far it may require something in the nature of international legislation are interesting questions. Perhaps we shall be told that there shall be no more wars requiring law as to rights and duties of neutrals. But *quaere.*

Trends in Conflict of Laws and Constitutional Law

Under CONFLICT OF LAWS, first in importance are the cases in the State

3. 321 U. S. 590 (1944).
4. Ilbert. *The Mechanics of Law Making,* 17, 188 (1914).

Courts which grew out of the overturning of the doctrine of *Haddock* v. *Haddock*[5] in *Williams* v. *North Carolina*.[6] But the second decision in the *Williams* case was then in the future, and the problems raised by State decisions must await another *Survey*. Incidentally it is brought out that one effect of the decision in the *Williams* case was to revive the practice of enjoining suits for divorce in other States. Other interesting discussions in this chapter have to do with basic questions of conflict of laws raised in State Courts by *Magnolia Petroleum Co.* v. *Hunt*;[7] administration of estates with assets in different States and the effect of unconscionable decrees of foreign Courts; jurisdiction to award custody of children and the doctrine of the *Restatement* on that subject; summaries of Rheinstein's discussion of the treatment of torts in the *Restatement of Conflict of Laws*;[8] and of a very cogent article by Morgan on substance and procedure for the purposes of application of *Erie R. C.* v. *Tompkins*[8] and for the purpose of choice of law.

An excellent survey of books, articles in periodicals, and decisions, in a year which brought forth much of far-reaching importance in CONSTITUTIONAL LAW, is contributed by Professor Reppy. At the outset he notes the significant action of the Supreme Court in *United States* v. *South-Eastern Underwriters' Assn.*[9] in which there was a double overruling: (1) Of the rule established by Chief Justice Marshall not to decide a constitutional question unless a majority of the whole Court concurred, and (2) Of a long line of former decisions in holding that insurance is interstate commerce under the Sherman Anti-Trust Law. He points out further that "the trend toward broader delegation of legislative powers and expansion of government administrative agencies has continued" and that there have been "noteworthy efforts to relate the Constitution to world organization." The survey of the prolific literature of constitutional law during the year includes books, Bar Association addresses and reports, law review articles, and law review notes of decisions.

Abrogation of the Constitution Through Judicial Decision

This survey of the current literature of a significant era in our constitutional development is of exceptional value. Not only are the summaries accurate and concise but they are made in a conspicuously fair spirit. As one reads it, he must needs be struck by the frequency in the writings reviewed of the phrase "new Constitution" and of such pronouncements as "a discarded Constitution," and "the failure of federalism in the United States." Remembering that not long since it was "liberal" to denounce the judges of the last century for usurpation of power, the complacent acceptance of remaking of the Constitution or abrogation of it through judicial decision by those who hold themselves "liberal" is significant. It is in line with a general rejection of law and with a cult of absolute exercise of power throughout the world. In the summary of Commager's *Majority Rule and Minority Rights*, Professor Reppy makes a proper criticism that the historian and political scientist, "in interpreting judicial decisions, fail to give proper emphasis to the procedural elements involved." Lawyers and law teachers have been much criticized for lack of appreciation of the social sciences pertinent to the law. It should equally be observed that the exponents of the social sciences, when they come to deal with the law, show at least a like lack of appreciation of the tasks and methods of the courts.

Interstate Commerce and Executive Power in Foreign Affairs

Under the heading INTERSTATE COMMERCE there is a sound and discriminating discussion of *United States* v. *South-Eastern Underwriters' Assn.*[10] and a summary and review of Professor T. R. Powell's brilliant and conclusive paper on that case.[11] The corollary in *Polish National Alliance* v. *National Labor Relations Board*[12] is also well, if briefly, reviewed.

In *Colorado* v. *Kansas*,[13] involving application of the common-law doctrine of riparian rights to States through which an interstate river runs, it was unfortunate that, for the first time since use of water on the public domain for irrigation became a matter of vital importance west of the hundredth meridian, there was no judge on the bench of the Court which has the last word on these questions who had first hand acquaintance with the water law of the Western States. The views of Field, Vandevanter and Sutherland on such a case would have been interesting.

Under the heading EXECUTIVE POWER IN FOREIGN AFFAIRS, two able and timely articles, by Patterson, *In re United States* v. *The Curtiss-Wright Corp.*,[14] and by Quarles, as to "The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?"[15] are well summarized and reviewed. Professor Reppy's conclusion that "the issue is one which may well be decisive in the struggle to preserve our government as against a future dictatorship" is pertinent and in line with what stands out on every side in the volume.

Due Process and Civil Rights Cases Are Reviewed

Similar reflections are aroused by the review of federal and State cases on due process of law, particularly by a quotation from the dissenting opinion of Mr. Justice Murphy in *Falbo* v. *United States*:[16] "That an individual should languish in prison for five years without being afforded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action is not in keeping

5. 201 U. S. 562 (1906).
6. 317 U. S. 282 (1942).
7. 320 U. S. 430 (1943).
8. 304 U. S. 64 (1938).
9. 322 U. S. 533 (1944).
10. *Ibid.*
11. Insurance as Commerce in Constitution and Statute, 57 *Harvard Law Rev.* 937 (1944).
12. 322 U. S. 643 (1944).
13. 320 U. S. 383 (1944).
14. 22 *Texas Law Rev.* 286, 445 (1944).
15. 32 *Georgetown Law Journ.* 375 (1944).
16. 320 U. S. 549, 560 (1944).

with the high standards of our judicial system." Professor Reppy's comment is worthy of quotation: ". . . although interlocutory interference with the administration of the Selective Service Act might result in some retardation of mobilization in a time of national crisis, the liberty of the individual should at all times be safeguarded, for what is it worth if it must be sacrificed in the face of every emergency, as that is the very moment when constitutional liberties are in greatest peril."

The theory of the Roman Empire from Augustus to Diocletian was that all the powers of the Roman magistrates, including that of initiating legislation, of governing the procedure of the Courts by edicts, and supreme military command, was conferred upon the Emperor for life in an emergency. Originally this delegation was had in a real emergency. But it became a habit. The emergency ceased to be acute; it became chronic. Also the Seventeenth-Century conflict between the Courts and the crown, out of which grew the principles of our American constitutional polity, was one between a quest of executive and administrative efficiency and one of securing the individual life.

Like reflections are aroused as one reads the review of the cases as to treatment of American citizens of Japanese birth or Japanese ancestry during the war. Professor Reppy's conclusion is: "While the federal government showed some disposition to drop war-time controls, it still remains true that, on the whole, the tendency of the federal government [and that means chiefly the federal executive] is to increase its power over economic systems, to regulate relations between capital and labor, to expand its control over interstate commerce, and to extend its reach into new fields of taxation."

(FIRST INSTALLMENT IN A SERIES OF FOUR ARTICLES)

The Assembly Elects Eleven Members of the House of Delegates

■ Because of the amendment of Article IV, Section 3, and Article VI, Section 3, of the Association's Constitution at the 1946 Annual Meeting (see 33 A.B.A.J. 183; February, 1947), the members of the Association present in Cleveland were called on to elect eleven of their number as Delegates from the Assembly to the House of Delegates. The number of Assembly Delegates was increased from eight to fifteen, by the amendments, for three-year terms, with five Delegates to be elected by the Assembly each year, aside from the filling of vacancies in the delegation.

At the opening session of the Assembly in Cleveland's Public Hall on September 22, nominations for Assembly Delegates were spiritedly made from the floor. Five Delegates were to be elected for a three-year term; five, for a two-year term; and one, for a one-year term. In any of the three groups, not more than one Delegate could be elected from any State.

Fifteen nominations were made for the eleven highly prized places. The voting was by printed ballots, with ballot-boxes placed at the entrance to the Public Hall and also at the Association's Headquarters in the Hotel Cleveland.

The results of the voting were:

For a Three-year Term	*No. of Votes*
JOHN J. PARKER, N. Carolina	404
JOHN T. BARKER, Missouri	324
JOSEPH C. HOSTETLER, Ohio	317
JAMES D. FELLERS, Oklahoma	315
JOHN M. SLATON, Georgia	300
For a Two-year Term:	
MORRIS B. MITCHELL, Minnesota	297
HAROLD H. BREDELL, Indiana	281
FLOYD E. THOMPSON, Illinois	280
W. E. STANLEY, Kansas	261
PAUL F. HANNAH, Massachusetts	261
For a One-year Term:	
A. W. DOBYNS, Arkansas	257

Hereafter five Assembly Delegates will be elected at each Annual Meeting, for a three-year term, with any additional elections required to fill vacancies arising for any cause, including failure to register by 12 o'clock noon on the opening day of the meeting. In the balloting for Assembly Delegates, a substantial advantage seems to be had by members who have been active and well-known in Association work and so have wide acquaintance among those attending an Annual Meeting. A regrettable feature is that because of many being engrossed in attending some of the many interesting programs which take place simultaneously in the Sections, etc., only about one-fourth of the Association members registered in Cleveland took advantage of the ample opportunities given to cast their ballot for their choice of representatives in the House of Delegates.

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"Judging Is also Administration":

An Appreciation of Constructive Leadership

by Harold H. Burton • Associate Justice of the Supreme Court of the United States

■ Returning to his home city which he served capably as Mayor and which helped to elect him to the Senate of the United States, Associate Justice Harold H. Burton was an honored figure at our Annual Meeting, as Cleveland's first citizen and a member of our Association since 1924. Before the Section of Judicial Administration, "the junior member" of what he had described as "the most junior Court we have had since the Court was ten years old" (33 A.B.A.J. 648; July, 1947) took his text from Chief Justice Taft's observation that "judging is also administration" and gave "an appreciation of constructive leadership in the judicial administration of the Courts of the United States." His documented narration and his just tribute were to specific accomplishments under the leadership of Chief Justices William Howard Taft, Charles Evans Hughes and Harlan Fiske Stone.

With respect to some of these constructive steps in improving the mechanics of judicial administration, Mr. Justice Burton gave credit to our Association's advocacy, and his documentation contains many references to our Association's Reports as well as to the *Journal*, where the record of many of these projects was made at the time, in connection with Association action. Singularly, he did not refer to our Association's very active part, and its long fight, for the creation of the Administrative Office of the United States Courts. (See 63 A.B.A. Rep. [1938] 184, 188, 261, 342, 749, 962; 24 A.B.A.J. [1938] 184, 188 [March]; 261, 342 [April]; 749 [September]; 962, 979 [December]; 64 A.B.A. Rep. [1939] 517; 25 A.B.A.J. [1939] 90-92 [February]; 451 [June]; 1006 [December]). He neither mentions nor refers to our Association's part in the enactment of the salutary bill to enable the retirement of justices of the Supreme Court (Public Law No. 10, 75th Congress, 1st Session, Chapter 21; 50 Stat. 24; 28 USC § 375 (a)) concerning which there are unpublished and unwritten chapters as to our Association's role. (See, moreover, 22 A.B.A.J. 741; October, 1936).

Mr. Justice Burton was doubtless aware, as he assembled and wrote his valuable narrative concerning the Court and the service of three great Chief Justices, that he wrote chiefly concerning facilities and agencies that tend to improve the efficiency and so the substance of justice, and that he dwelt little on the Court's concept of laws and the Constitution and the Court's impacts on our constitutional republic. He discussed the statutory enlargement of the discretionary, and the restriction of the obligatory, jurisdiction of the Court; but he did not refer to the disposition of the Court to "defer" to the decisions of administrative agencies as to what statutes mean and what the law and policy of a subject should be and is, nor did he include the Administrative Procedure Act as proffering a further forward step, if the Court would but adopt and follow the expressed intent of its legislative authors as to judicial review and so give full force and effect to the standards set by the Act as to what should be reviewable. As to these and other aspects, Dean Roscoe Pound's trenchant analysis of recent trends, published elsewhere in this issue, will be found significant. Meanwhile Mr. Justice Burton is performing what is indubitably a service to the Court and the federal judicial system, through such expositions as we published in our July issue (page 645) and as we give here.

■ On June 30, 1921, former President William Howard Taft was nominated Chief Justice of the United States. At the October Term he found the Supreme Court of the United States more than a year behind in its docket.[1] The Court was flooded not only with cases entitled to full consideration but with many not justifying further review. The Court sat in the much-liked original Senate Chamber in the Capitol but lacked adequate facilities for its library, its Clerk, its Marshal, the members of its Bar and the chambers

of its Justices. The rules of procedure throughout the federal Court system were antiquated and cumbersome. Many of the lower federal Courts were behind in their dockets but there was little authoritative information by which to measure the need for additional permanent district or circuit judges. There was no coordination between the administrative offices of the federal Courts, much less any businesslike control over their operations. There was no authorized procedure for mobilizing the experience of the Courts to help Congress consider legislation dealing with judicial administration. Instead of translating the tremendous motive power of the people into efficient judicial action, the administration of our Courts often handicapped the judges in dispensing justice. It was clear that not only wisdom and clarity but speed and efficiency were essential to the judicial process. "Judging is also administration";[2] and in the face of such conditions, Chief Justice Taft and his successors in office have demonstrated the value of competent judicial administration to the cause of justice.

Almost exactly twenty years later, when Chief Justice Charles Evans Hughes, on July 1, 1941, retired from his eleven years of arduous service which followed the equally arduous nine of his predecessor, the judicial administration of the Supreme Court of the United States had changed from a cause of national concern to one of national pride. The federal judiciary had been converted from an outstanding example of an unordered judiciary to an outstanding example of efficient judicial administration. Chief Justices Harlan Fiske Stone and Fred M. Vinson have maintained this high standard.

1921-1941 was a time when economic readjustments led to many fundamental changes in governmental structures and policies. Nevertheless, through the application of the wide executive experience of the two Chief Justices of the United States who served in that period, the Courts of the United States not only preserved our judicial structure but strengthened it.

The technique of the judicial process is as properly the responsibility of the judges and lawyers as the technique of automobile production is the responsibility of mechanical, industrial and financial experts. Judicial administration is largely a technical matter dealing with the jurisdiction, structure, procedure, personnel and equipment of the Courts and of their administrative agencies. Each of these subjects in our federal judicial system needed and received the personal attention of Chief Justices Taft and Hughes. They came to this task of judicial administration equipped with an extraordinary wealth of appropriate experience. In addition to several years of federal judicial experience, each had had long and practical experience in dealing with the executive and legislative procedure of a free and representative government. Each had an appreciation of the initiative, determination and patience required to secure the substantial improvements sought.[3] Chief Justice Taft laid the essential foundations for the improved judicial administration of the federal Courts. Chief Justice Hughes built important superstructures upon those foundations.

Of their contributions to the improvement of judicial administration five are emphasized here:

1. The Coordination of the Federal Judiciary.

2. The Enlargement of the Discretionary, and the Restriction of the Obligatory, Jurisdiction of the Supreme Court.

3. The Building and Equipment of the Supreme Court Building.

4. The Federal Rules of Civil Procedure.

5. The Administrative Office of the United States Courts.

1. *The Coordination of the Federal Judiciary*

Traditionally, not only the Supreme Court but each Court of the United States had been administratively independent of every other Court and of every administrative control. While litigated cases moved from Court to Court, and orders issued by the several Courts generally were obeyed by those to whom they were directed, there was little coordination of administrative service. There was no statistical information, authoritatively analyzed, as to the work of the Courts. Statistical ma-

1. "By 1921 it required between something more than a year to something less than two years for a case to be reached for argument after its docketing, and there was grave ground for apprehension that the calendar would soon become even more congested." Charles E. Hughes, Jr., in *Proceedings in Memory of Mr. Justice Van Devanter*, 316 U. S. V, XII.

On March 30, 1922, Chief Justice Taft estimated that it then took eighteen to twenty-four months to reach an ordinary case on the Docket. *Hearing before Committee on the Judiciary, House of Representatives, on H. R. 10479, 67th Cong., 2d Sess. 7, 12.*

2. Hart: "The Business of the Supreme Court at the October Terms, 1937 and 1938," 53 *Harv. L. Rev. 579, 613.* That article is the concluding one in the following series covering the Judicial Administration of the Supreme Court of the United States since 1789:

Frankfurter and Landis: *The Business of the Supreme Court (1789-O. T. 1926);* Frankfurter and Landis: "The Supreme Court under the Judiciary Act of 1925 (O. T. 1927)," 42 *Harv. L. Rev.* 1; Frankfurter and Landis: "The Business of the Supreme Court at October Term, 1928," 43 *id.* 33; (O. T. 1929), 44 *id.* 1; (O. T. 1930), 45 *id.* 271; (O. T. 1931), 46 *id.* 226; Frankfurter and Hart (O. T. 1932), 47 *id.* 245; (O. T. 1933), 48 *id.* 238; (O. T. 1934), 49 *id.* 68; Frankfurter and Fisher (O. T. 1935 and 1936), 51 *id.* 577.

3. Chief Justice Taft, in addition to many years spent in the general practice of his profession, in professional organizations, and in his service as Chief Justice of the United States, 1921-1930, served as: Assistant Prosecuting Attorney of Hamilton County, Ohio, 1881-1883; Assistant County Solicitor of Hamilton County, 1885-1887; Judge of the Superior Court in Cincinnati, Ohio, 1887-1890; Solicitor General of the United States, 1890-1892; U. S. Circuit Judge for the Sixth Circuit, 1892-1900; Professor and Dean of the Law Department, University of Cincinnati, 1896-1900; President of the U. S. Philippine Commission, and later the First Civil Governor of the Philippine Islands, 1900-1904; Secretary of War, 1904-1908; and President of the United States, 1909-1913. During his Presidency, Congress adopted the Judicial Code of March 3, 1911, and he appointed to the Supreme Court Associate Justices Lurton, Hughes, Van Devanter, J. R. Lamar and Pitney. He also appointed Associate Justice White as Chief Justice of the United States. From 1913-1921, he served as Kent Professor of Law at Yale University.

Chief Justice Hughes, in addition to his general practice of his profession, his activity in professional organizations and his service as Chief Justice of the United States, 1930-1941, served as: Professor of Law and Lecturer at Cornell and at the New York School of Law, 1891-1900; counsel for the Stevens Gas Commission (N. Y. Legislature), 1905; counsel for the Armstrong Insurance Commission (N. Y. Legislature), 1905-1906; Governor of New York, 1907-1910; Associate Justice of the Supreme Court of the United States, 1910-1916; Candidate for President of the United States, 1916; Secretary of State of the United States, 1921-1925; member of the Permanent Court of Arbitration, The Hague, 1926-1930; Judge of the Permanent Court of International Justice, 1928-1930.

terial presented to Congress as a basis for appropriations was collected largely by the Attorney General of the United States. This produced the inappropriate result that the federal Courts, before which the Attorney General's staff constantly appeared, were dependent upon that same Attorney General for recommendations in support of appropriations for the Courts.

In 1921, the most pressing need of the federal Courts was for additional judges or for a reduction in pending cases. The absence of factual data as to the comparative needs of the different districts made it difficult for anyone to determine what relief might be secured by temporary reassignments of judges between districts and even between circuits. Furthermore, there was no judicial authority adequate to make such reassignments or even to bring judges together to prepare recommendations as to the relative needs of their respective districts.

As soon as William Howard Taft became Chief Justice, he brought to bear on this issue his unique combination of experience as a Circuit Judge and as President of the United States. He saw all sides of the question. As President he had devoted much attention to the appointments he made to the federal judiciary and he had approved the creation of two new Courts, namely, the United States Court of Customs Appeals[4] and the United States Commerce Court.[5] Since 1909, the American Bar Association had advocated judicial reform pointing toward a unified judiciary and a judicial council.[6] In 1914, after leaving the Presidency, Mr. Taft had urged the establishment of a council of federal judges "to consider each year the pending Federal judicial business of the country and to distribute [the] Federal judicial force of the country through the various districts and intermediate appellate Courts, so that the existing arrears may be attacked and disposed of".[7]

As Chief Justice, he gave his vigorous support[8] to a proposed amendment to the Judicial Code providing for the summoning annually by the Chief Justice of the United States of a Conference of the Senior Circuit Judges to meet in Washington on the last Monday in September. The amendment proposed, among other things, that—

> Said conference shall make a comprehensive survey of the condition of business in the Courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various Courts as may seem in the interest of uniformity and expedition of business.[9]

The bill also authorized a senior circuit judge to reassign district judges of his circuit temporarily to where they might be most needed in that circuit. Under certain limitations, the Chief Justice of the United States, likewise, was authorized to assign to such duty a district judge or a circuit judge from outside the circuit where the need existed.[10] He said of this proposal:

> These provisions allow team work. They throw upon the council of judges, which is to meet annually, the responsibility of making the judicial force in the Courts of first instance as effective as may be. They make possible the executive application of an available force to do a work which is distributed unevenly throughout the entire country. It ends the absurd condition, which has heretofore prevailed, under which each district judge has had to paddle his own canoe and has done as much business as he thought proper.[11]

As finally adopted, September 14, 1922, the Act also authorized the appointment of twenty-four additional district judges.[12]

This application of administrative common sense to an uncoordinated judicial system provided a permanent mechanism for securing factual appraisals of the requirements of the respective districts for adjustments in judicial manpower. It established a natural agency for the coordination of policies and for the consideration, and even initiation, of legislative proposals affecting the judiciary. For example, the regular session of this Conference, held October 1-4, 1946, dealt with twenty-two administrative and legislative problems none of which otherwise could have received comparable attention and as to which the executive and legislative branches of the Government otherwise could not have received as competent an opinion.[13]

2. *The Enlargement of the Discretionary, and the Restriction of the Obligatory, Jurisdiction of the Supreme Court*

In 1924, except upon an order for

4. Act of August 5, 1909, 36 Stat. 105. It is now the United States Court of Customs and Patent Appeals, Act of March 2, 1929, 45 Stat. 1475.

5. Act of June 18, 1910, 36 Stat. 539. Abolished by Act of October 22, 1913, 38 Stat. 219.

6. Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 34 A.B.A. Rep. 578.

7. William H. Taft: "The Attacks on the Courts and Legal Procedure;" Address at Cincinnati Law School Commencement, May 23, 1914, 5 *Ky. L. J.* 1, 15.

8. His support included, among other efforts, his testimony of October 5, 1921, in the Hearings on S. 2432, 2433 and 2523, before the Senate Committee on the Judiciary, 67th Cong., 1st Sess. 11. During the pendency of the bill in Congress, he spoke on this subject before the American Bar Association at Cincinnati, August 10, 1921, 46 A.B.A. Rep. 561, and at San Francisco, August 10, 1922, 8 A.B.A.J. 601, 47 A.B.A. Rep. 250, 6 J. Am. Jud. Soc. 36, 57 Am. L. Rev. 1 and the Chicago Bar Assn., December 27, 1921, 8 A.B.A.J. 34.

9. Act of September 14, 1932, 42 Stat. 838-839. That Act provided also that—

"The senior district judge of each United States district court, on or before the first day of August in each year, shall prepare and submit to the senior circuit judge of the judicial circuit in which said district is situated, a report setting forth the condition of business in said district court, including the number and character of cases on the docket, the business in arrears, and cases disposed of, and such other facts pertinent to the business dispatched and pending as said district judge may deem proper, together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing. Said reports shall be laid before the conference [of senior circuit judges] . . ., by said senior circuit judge, . . ., together with such recommendations as he may deem proper." *Id.* 838.

The Conference of Senior Circuit Judges now includes also the Chief Justice of the United States Court of Appeals for the District of Columbia. 50 Stat. 473.

10. 42 Stat. 839. The Act of August 27, 1937, 50 Stat. 753, has strengthened the authorization.

11. Address to American Bar Association at San Francisco, August 10, 1922: 6 *J. Am. Jud. Soc.* 37; *57 Am. L. Rev.* 3, and see 8 *A.B.A.J.* 601-602, *47 A.B.A. Rep.* 252.

12. 42 Stat. 837.

13. At the 1946 Conference, the Chief Justice of the United States presided. The ten circuits, plus the District of Columbia, were represented. Five other federal judges reported on special committee assignments. Addresses were made by the Chairman of the Judiciary Committee of the House of Representatives and by the Attorney General. The latter dealt with the Administrative Procedure

advancement, it still required a year to reach a case on the docket of the Supreme Court.[14] In the years immediately preceding the October Term, 1925, the obligatory jurisdiction of the Court accounted for over 80 per cent of the cases on its appellate docket, or about 250 cases a year. The remaining 20 per cent consisted of sixty to seventy cases in which petitions for certiorari had been granted, out of about 500 such petitions directed to the discretionary jurisdiction of the Court.[15] As long as the obligatory jurisdiction thus applied to so much of the docket, there was little hope of limiting hearings to cases of public significance or of relieving the Court from hearing cases which presented no substantial reason for a further review. With an approaching increase of federal litigation, the Court foresaw that its docket would be so filled with cases under its obligatory jurisdiction that it would not be able to give to issues of public concern the attention they deserved. On the other hand, the establishment of the Circuit Courts of Appeals,[16] and the abolition of the Circuit Courts,[17] together with the authorization of a partially discretionary control by the Supreme Court over the cases to be reviewed from those Courts,[18] were providing a satisfactory solution within the limited class of cases thus affected. The mechanism controlling this discretionary jurisdiction was proving to be one of the best devices for governmental control of discretionary procedure in this nation's broad experience with checks and balances.

Thus fortified by thirty years of experience with petitions for certiorari, the Court, even before Chief Justice Taft joined it, had appointed a Committee of Justices to prepare legislation which would further restrict the obligatory jurisdiction of the Court and would substitute for it the Court's discretionary jurisdiction.[19] The bill became known as the Judges' Bill and the plan proposed by the justices was to limit reviews much more strictly to cases in which a petition for certiorari had been granted. Due largely to the active sponsorship of it by the Chief Justice and the Court's Committee of Justices, it was approved February 13, 1925.[20] It has been eminently successful and has become the basic mechanism in maintaining a flexible, but firm, control over the volume of the Supreme Court's work.

The granting or denial of a petition for certiorari is not a decision on the merits of the case. Nearly every case in which a petition for certiorari is required has been heard previously by a federal or state Court of three or more judges. In most of them, a separate trial Court also has passed upon the issues. The character of the reasons guiding the Supreme Court's discretion in acting on petitions for certiorari are stated in its Rules.[21] Accordingly, nearly all of the cases decided in the Circuit Courts of Appeals no longer are reviewable in the Supreme Court except upon a writ of certiorari, which is granted only in the discretion of the Supreme Court. This has enabled the Supreme Court to protect itself against such abuse of its jurisdiction by litigants as previously had occurred and again was being threatened. The danger of an overloaded docket, without such a check, is evident from the fact that, from 1925 to the present, the denial of these petitions at each term has averaged about 80 per cent of those filed.[22] Without further explanation, such

(Continued on page 1164)

Act, the Federal Tort Claims Act, the new Federal Rules of Criminal Procedure, the Federal Jury Bills, Youth Offenders' Bill, Public Defenders' Bill, Habeas Corpus Procedural and Jurisdictional Bills and Bills as to reviews of orders of certain administrative agencies. He requested appointment of a committee to consider procedure in cases of juvenile delinquency.

The Seventh Annual Report of the Director of the Administrative Office of the United States Courts was received. It included a Report of the Division of Procedural Studies and Statistics and is printed with the Report of the Conference.

The state of the Dockets of Circuit Courts of Appeals, District Courts and Special Courts was reviewed.

Other matters reviewed and generally made the subject of specific recommendations, were those of: Additional Judges; Court Reporters (including changes in basic salaries, description of positions and operating arrangements, and recommendations as to provisions on court reporters in proposed revision of the Judicial Code); Budget Estimates; Bankruptcy Administration, including recommendations as to proposed amendments to the Bankruptcy Act and as to action to be taken at a special meeting of the Conference to be called to deal with the new Referees' Salary Act (This special meeting was held April 21-22, 1947, and final action was taken in time to go into effect July 1, 1947); Review of Orders of Interstate Commerce Commission, other Administrative Agencies and of Three-Judge Courts; Treatment of Insane Persons Charged with Crime in the Federal Courts; Sentencing and Parole of Federal Offenders; Removal of Civil Disabilities of Probationers Under Certain Conditions; Trial of Minor Offenders by Commissioners; Transfer of Jurisdiction for Supervision of Probationers from Court of Original Jurisdiction to the District of Supervision; Use of Trial Memoranda in Criminal Cases; Habeas Corpus Procedure; Jury System; Representation of Indigent Litigants; Judicial Statistics; Assignments of Judges Outside of their Circuits; Amendments to Admiralty Rules; Disposition of Old Records; Postwar Building Plans for Quarters of the U. S. Courts; Salaries in the Administrative Office of the U. S. Courts; Procedure in Circuit Conferences as to Legislation Affecting District Courts and District Judges; and Keeping of Certain Court Offices Open on Saturday Forenoons. A Conference Committee on Probation with Special Reference to Juvenile Delinquency was added to the existing committees. Two Conference Committees were discharged and all others continued.

14. Mr. Justice Van Devanter estimated that the Court then was "hearing cases on the regular call that have been on the docket about 12 or 13 months." Hearing before a Subcommittee of the Committee on the Judiciary of the Senate on S. 2060 and 2061, 68th Cong., 1st Sess. 42 (1924). Chief Justice Taft, two years before, had estimated it at eighteen to twenty-four months. See note 1, *supra*.

15. These approximations are based upon the tables as to the docket of the Supreme Court in Frankfurter and Landis: "The Supreme Court Under the Judiciary Act of 1925," 42 *Harv. L. Rev.*, 1, 10, 13.

16. Act of March 3, 1891, § 2, 26 Stat. 826.

17. Act of March 3, 1911, § 289, 36 Stat. 1167.

18. Act of March 3, 1891, § 6, 26 Stat. 828.

19. This Committee consisted of Justices Day and McReynolds, with Chief Justice White as a member *ex officio*. Chief Justice Taft added Mr. Justice Van Devanter to the Committee, and himself pressed the matter vigorously. Upon the retirement of Mr. Justice Day, Mr. Justice Van Devanter became the Committee Chairman and the principal draftsman of the Bill. (Chief Justice Taft, 35 *Yale L. J.* 2.) Mr. Justice Sutherland, a former member of the Senate Committee on the Judiciary, was added to the Committee and the Bill was thoroughly explained in Committee Hearings. *E. g.*, Chief Justice Taft, in Hearing before Committee on the Judiciary, House of Representatives, on H. R. 10479, 67th Cong., 2d Sess. 1 (1922); Justices Van Devanter, McReynolds and Sutherland, in Hearing before Subcommittee of Committee on the Judiciary of the Senate, on S. 2060 and 2061, 68th Cong., 1st Sess. 25-62 (1924). Justices Van Devanter, McReynolds and Sutherland, with Chief Justice Taft, in Hearing before Committee on the Judiciary, House of Representatives, on H. R. 8206, 68th Cong., 2d Sess. 6-30 (1924).

For a summary of the nature and effect of this bill and of the service rendered by this Committee, see statement by Charles E. Hughes, Jr., in *Proceedings in Memory of Mr. Justice Van Devanter*, March 16, 1942, 316 U. S. V, XII-XIV.

20. 43 Stat. 936.

21. Revised Rules of the Supreme Court of the United States, Rule 38 (5), 306 U. S. 718-719. See also, Rule 12 as to Jurisdictional Statements Required in Appeal Cases, 306 U. S. 694, amended 316 U. S. 715.

22. "At the 1937 term 701 petitions [for certi-

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Archibald K. Gardner:

Senior Circuit Judge—Eighth Circuit

■ The Eighth Circuit here makes its second appearance in our series of cover portraits and sketches of Senior Circuit Judges of the United States Circuit Courts of Appeals. In our May issue (page 448) we presented Judge Kimbrough Stone, of Missouri. In that month he retired from the bench and was succeeded as Senior Circuit Judge by Archibald K. Gardner, of Huron, South Dakota, a member of our Association since 1911. United States District Judge John Caskie Collet, of Missouri, was nominated by President Truman to succeed Judge Stone in the Eighth Circuit Court of Appeals, and was confirmed by the Senate, with the endorsement of our Association's Committee to consider appointments to the federal judiciary.

Although he has been on the bench only since 1929, Judge Gardner is in years eight years older than Judge Stone whom he succeeds. In his eightieth year, he is the oldest of the Circuit Judges now actively serving. Only two judges in the federal judicial system are his seniors in age. The oldest active federal judge is District Judge Tilman D. Johnson, of Salt Lake City, Utah, who was born on January 8, 1858. Next is Associate Justice Thomas L. Bailey, of the District Court for the District of Columbia, who was born on June 6, 1867. Judge Gardner was born in Newton, Iowa, on December 3, 1867.

Sketch of Judge Gardner's Career

■ The new Senior Circuit Judge of the Eighth attended the University of Iowa, where he received an A. B. degree in 1892 and an LL. B. degree in 1893. He was a conscientious student and a hard worker. He immediately began the practice of law in association with Judge L. W. Shafer, whose office was at Greenfield, Missouri. This connection lasted for two years, until 1895, when Judge Gardner left Missouri and took up his residence at Rapid City, South Dakota, then one of the most colorful spots in the Northwest. South Dakota had, at that time, been admitted to the Union for only six years. Rapid City, located about midway on the eastern slope of the Black Hills, was pretty much a trade center for both the gold mining industry of the Hills, as well as for the cattle ranches on the plains to the east.

Judge Gardner remained in the Black Hills for twelve years. He first formed a partnership with one W. O. Temple, which was shortly thereafter dissolved. In 1899 the firm of Buell and Gardner was created. Judge Gardner was selected as general attorney for the Chicago & Northwestern Railroad for the State of South Dakota in 1907, a position which resulted in his moving to Huron. There he formed a new partnership, known as Gardner and Churchill. Mr. Churchill and Judge Gardner continued together in the active practice of law until 1929, when the latter's appointment to the bench caused his retirement from the firm.

Judge Gardner was appointed a Circuit Judge by President Coolidge in 1929. Before the Senate confirmed the appointment, the Coolidge administration ended. In the early days of the new administration, Judge Gardner was named again for the same position by President Hoover. This appointment was confirmed on May 23, 1929. Judge Gardner entered on the duties of his office on June 3, 1929, when he was 62 years old.

A Prodigious Worker as a Practicing Lawyer

During his years at the Bar, Judge Gardner had made a reputation as a prodigious worker. For some years he maintained an active interest with his old firm at Rapid City, carried on his duties as a general solicitor for the Chicago & Northwestern Railroad, and likewise bore the responsibility of a rapidly increasing private practice in his new office at Huron. Much of this took place in

the days before the era of rapid transportation, before airplanes and modern highways had materially shortened distances. It was a common occurrence for Judge Gardner to go to Chicago on railroad business. This required him to spend a day and a night in travel, a day in Chicago, and the following night and day on the train returning to Huron. Upon reaching Huron, he would leave that night for his office at Rapid City, where he would arrive on the following day, put in the day at his office in Rapid City, and then spend the next night getting back to his office at Huron. During the long train trips he occupied himself with work which he habitually carried with him for that purpose.

Some indication of the hard work which he devoted to his private law practice is evidenced by the office hours which he formerly kept. His day at the office began at 8:30 in the morning and continued until noon, with an hour off for lunch. He was back in his office promptly at 1 o'clock and stayed until 6 o'clock. At least five nights a week he returned to the office no later than 8 o'clock, for some hours of additional work. Sundays were no exception to this general rule. It was not a regime which permitted much outside recreation or the adoption of any hobby other than the law.

Personal Angles of His Many Sided Life

Judge Gardner was married to May McHard on October 15, 1896, and to this union were born two daughters and a son. Following in his father's footsteps his son William entered law practice at Huron. His tragic death from illness a few years ago was a very severe blow to his father. William Gardner was survived by a widow and five children, one of whom was born soon after his father's death. These are the only grandchildren; the Judge and Mrs. Gardner have taken a very active part in helping the mother in raising the family.

Judge Gardner has been a regular attendant and liberal supporter of the Congregational Church during most of his active life, although he did not take out church membership and unite with the church until some six or seven years ago. During his private practice it was his usual custom to pick up his mail at the post office on Sunday morning, and then go to his office. He invariably left it in time to attend Sunday morning service. He was also an active member of the Board of Trustees of Huron College, a Presbyterian-sponsored institution, for about thirty years, and is now President Emeritus of the Board. He received an honorary degree of LL. D. from Huron College in 1939, and was honored this year at the annual commencement of the University of Iowa as one of the distinguished alumni of that institution, and was given an Achievement Recognition Certificate.

As a practicing lawyer he took a prominent part in the activities of The State Bar of South Dakota and served as its President. In politics he is a Republican.

Still a Hard Worker in Judicial Office

When Judge Gardner was appointed to the Circuit bench he had been in active practice for thirty-six years. He has been fortunate in possessing a splendid physique and excellent health, and the tremendous amount of energy which he expended in his private practice seems not to have impaired in any way his vitality. He has now been on the Circuit bench for eighteen years, and will be eighty years of age in December. He still carries on his duties with much the same vigor which characterized his years in private practice.

One of the outstanding characteristics which has distinguished Judge Gardner's career has been his willingness at all times to assist young lawyers with their problems. This was as true during his busy life as a practicing lawyer as it is today. Anything connected with the law has always been of the greatest interest to him, and in his private practice the legal problems of young lawyers were as fascinating to him as were his own cases.

He has great personal charm and dignity, which are manifest on the bench.

Activity and Experience as a Practicing Lawyer

A review of the cases decided by the South Dakota Supreme Court during the years Judge Gardner practiced in that State shows that he appeared as counsel in some two hundred actions, in most of which he had taken an active part in the trial in the lower Court, as well as in the briefing and appearance in the Supreme Court. He handled a varied type of litigation. In his early practice in the Black Hills, he appeared in many mining right cases, as well as in actions involving water rights. He also handled cattle litigation, banking cases, and was attorney for the defendant in many criminal actions.

Later, as attorney for the Northwestern Railroad, he handled many railroad accident cases in addition to a varied type of general civil litigation. He tried a murder case with the same ease and facility as he did one involving a contract or tort. When he was being considered for the appointment to the Circuit Court of Appeals, the then Judge of the United States District Court in South Dakota, who had then been on the bench for nearly twenty years, wrote a letter supporting the appointment and—among other things—said with reference to Judge Gardner: "He has had more business in my Court than any other twelve lawyers in South Dakota."

The career of Judge Gardner is a saga of hard work. His success came not from unusual brilliance or inspiration, but from careful and painstaking attention to minute details. His mind was, and is, keen and alert. He has a retentive memory which permits him to assimilate details and arrange them logically for his use. Like most successful trial lawyers, the Judge has been strong in his convictions but—like all broad-minded men—he does not hesitate to acknowledge a fault or to accept another's viewpoint when convinced that his own judgment is erroneous.

Characteristics of His Numerous Opinions During Eighteen Years

On the bench Judge Gardner works with the same diligent attention to minute detail that characterized his efforts in private practice. His opinions are written with an ease and facility which are clearly the result of his many years in private practice, when he worked under extreme pressure. His mind has been so trained that he finds it easy to organize his thoughts, assemble his material and dictate his opinions offhand instead of laboriously writing them out in long hand. He writes in the lawyer's style, and his opinions are regarded as logical, intelligible and clearly understandable. When he develops a point of law, it is along logical lines and the development is thorough, even exhaustive. His style is clear, forceful and very readable; and his points of law are fortified with an abundance of authority. His mind is quick, and his keen logic slices its way promptly into the core of whatever question is under discussion.

He still loves to work and is impatient if he runs out of opinions to write. The Eighth Circuit is one with a heavy volume of appellate work, and Judge Gardner has always done, and still does, his full share of the work of the Court. This is evidenced by the fact that in the eighteen years he has served on the Court he, according to the Clerk's record, participated in 3398 decisions of the Court, and has filed opinions in 553 cases. He has written only nine dissenting opinions.

Comment on Some of His Interesting Opinions

One of his interesting and readable opinions was in *Hartzell* v. *United States*, 72 F. (2d) 569, 586. This was a mail fraud action involving the supposedly fabulous estate of the noted buccaneer and navigator, Sir Francis Drake. After carefully reviewing the record and the numerous exceptions at great length, Judge Gardner tersely disposed of the major contentions of the appellant as follows:

> In the instant case, according to the undisputed evidence, a fraud has been carried on for years, and these undisputed facts constitute a violation of the statute with which the defendant was charged, and we are of the view that it was proper for the Court, in its discretion, so to advise the jury. . . . The undisputed facts in this case can give rise to no conflicting inferences. It is impossible that any inference of innocence or honesty can be predicated upon this record, and if, as is stated in the *Murdock* Case, the trial judge has the power to express his opinion as to the guilt of the defendant, it would seem that this is a proper case for the exercise of that discretion.

Judge Gardner's opinion in *Walker* v. *United States*, 93 F. (2d) 383, 390, furnished the basis which supported the so-called Pendergast election fraud cases in Kansas City. In the District Court the late Judge Merrill E. Otis, who possessed an excellent vocabulary, used particularly virulent language in his charge to the grand jury. In disposing of the exception raised by the appellant to this charge, Judge Gardner said:

> . . . The charge of the trial judge is a scathing condemnation, oratorically expressed to be sure, of various kinds of election crimes and frauds. Some of the expressions complained of were intemperate and are not to be commended as models in explaining to grand jurors the nature of their duties. It lays emphasis on the duty of the grand jury, but at the same time it does not go so far as to urge that any individual, guilty or innocent, named or unnamed, be accused by indictment. We do not think prejudice has been shown, and the Court did not err in overruling the pleas in abatement.

Judge Gardner wrote a number of opinions involving the National Labor Relations Act and the National Labor Relations Board. The clear-cut and concise language, which characterizes and distinguishes his opinions, has no better example than that found in those cases wherein it became necessary for him to discuss the constitutional rights of free speech. In one of his leading cases, *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. (2d) 486, 500, while discussing the First Amendment, Judge Gardner said:

> The First Amendment is intended to assure a privilege that in itself must be so actual and certain that fear and doubt are absent from the individual's mind, or the freedom is but an abstraction. If the speaker must hesitate before uttering his thoughts, if he must weigh and nicely balance every word so as to determine whether what he is about to say is permitted or forbidden, the guaranty tendered by the Constitution is little more than theoretical. He is "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion." *Thomas* v. *Collins*, *supra*. If subtleties may be invoked as the basis for an inference that non-coercive remarks may have had an "altered import" in the minds of the listeners, any employer would be subjected not only to the "varied understanding of his hearers," but also subjected to the chance of what the Board might infer. We think such a doctrine would take away all "security for free discussion." We are of the view that there is no evidence which could reasonably be said to give to Barr's remarks the import of a covert threat. No specific utterances of Barr have been pointed out as having such import, and the guarantees of the First Amendment can not be "defeated by insubstantial findings of fact screening reality."

Hunter and Generalissimo of "Gardner's Guerrillas"

Since his appointment to the Circuit bench, Judge Gardner has had more available time for outside activities than he had while in private practice. In recent years and late in life, he has become an ardent hunter. His home at Huron has, for many years, been near the center of good pheasant territory. When he was well along toward three score and ten, he decided to take up hunting, and did so with great enthusiasm and with the same minute attention to details that has characterized his work both as a lawyer and judge.

He promoted, organized and became the leader of a group of local pheasant hunters at Huron. It consists of about twenty-five business and professional men, who are known as "Gardner's Guerrillas." The average age of this group may be much too high to insure the best hunting results, but this in no way

lessens the enthusiasm. Annually, before the opening day of the hunting season, each member of the group receives a written order from his generalissimo, "the Judge," couched in bombastic and dictatorial language, designating the time and place of assembly and outlining the special duties, if any, of the recipient. It is a tradition with its members that all "Gardner's Guerrillas" who can escape for the day take part in the opening of the hunting season.

This annual hunt, which closes with a substantial dinner, is the one that brings out the Judge's whole group. Other hunts are arranged during the season, at the call of Judge Gardner, who likewise entertains various members of the federal judiciary. They find that a trip to Huron and a hunt with "Gardner's Guerrillas" are most delightful experiences. Along with Judge Gardner's mature experiences at the Bar and his diligent service on the bench go his capacity for friendship and agreeable sportsmanship, which have become strong characteristics of this rugged jurist.

U. S. Civil Service Commission Announces Competition for Hearing Examiner Posts

■ Pursuant to the Administrative Procedure Act, the United States Civil Service Commission has announced an examination or competition to fill the many Hearing Examiner positions under the Act, in Washington, D. C., or throughout the United States, at salaries to range from $4902 to $9975 a year. No written test is to be required, but the Commission states that applicants will be rated on their experience and training relevant to the duties of the position.

To qualify for this competition, the Commission states that all applicants must have had progressively responsible experience, during at least six years, "which has demonstrated conclusively their ability to conduct hearings in a dignified, orderly and impartial manner; determine credibility of witnesses; sift and analyze evidence; apply agency and Court decisions; prepare clear and concise statements of fact, law and order; and exercise sound judgment. The applicants must also show conclusively that they are persons of judicial temperament and poise."

As between general and special experience, the division of the minimum six years varies according to the grade of the position. For positions paying from $4902 to $7102 a year, part of the experience may have been of a general nature, in legal practice or in technical work performed in a field appropriate to the field in which hearings are conducted, such as rates, finances, violations, licenses, benefits or regulations. For the higher-paying positions, all of the experience must have been obtained in legal proceedings as a judge, master or referee of a Court of record, or as a member officer or employee of a Governmental regulatory body, or in work which included responsibility for the preparation or presentation of cases conducted before a governmental regulatory body or a Court of record. Categories or types of cases in which applicants must have participated are described in the Examining Circular (EC-17), which can be obtained. Oral interviews before a board will be given applicants to determine their personal qualifications for the positions. The age limit of sixty-two years is waived for persons entitled to veterans' preference.

The Commission says that "applicants' experience must have demonstrated, in connection with cases in one or more of the categories decribed above, a broad knowledge of the technical, legal and economic factors likely to be encountered in such cases; ability to analyze and decide issues of fact and law, involving complex and diverse legal and economic considerations; ability to conduct hearings in a dignified, orderly and impartial manner; ability to apply legal precedents; ability to write clear and concise statements of fact and law, recommendations, decisions and orders."

Many of the specifications appear to be such as to give a substantial advantage to incumbent Examiners or other agency employees. The Commission's circular states, moreover, that "Hearing Examiner positions in the Federal service provided by the Administrative Procedure Act (Public Law 404, 79th Congress) will be filled from this examination unless it is in the interest of the service to fill any position by the appointment of already qualified hearing Examiners through reinstatement, transfer, or promotion". Persons now on federal payrolls, but not as Examiners, "and who desire to be appointed to these positions must compete in this examination successfully and be rated high enough to be reached in regular order of certification. Transfers or reassignments to Hearing Examiner positions are not otherwise possible. Further information about rules affecting such transfers may be obtained from agency personnel offices".

Application forms and other information may be obtained by lawyers interested, from the U. S. Civil Service Commission, Washington 25, D. C., from most first- and second-class post offices, or from Civil Service regional offices which are in thirteen principal cities. Applications will be accepted in the Commission's Washington office until further notice.

The 1947 Association Medal: Award to William L. Ransom

by **E. J. Dimock** • of the Board of Editors

■ On September 25, our Association honored one of its most devoted servants by the bestowal of the American Bar Association Medal. William L. Ransom became the fourteenth recipient of that award for conspicuous services in behalf of American jurisprudence and justice during or culminating in the year. He thereby joined that famous group that began with the beloved Samuel Williston and has had added unto it down the years such illustrious predecessors as the incomparable Oliver Wendell Holmes, our Editor-in-Chief Emeritus Edgar Bronson Tolman, Chief Justice Charles Evans Hughes and, last year, the Administrative Procedure Act's sponsor, Carl McFarland.

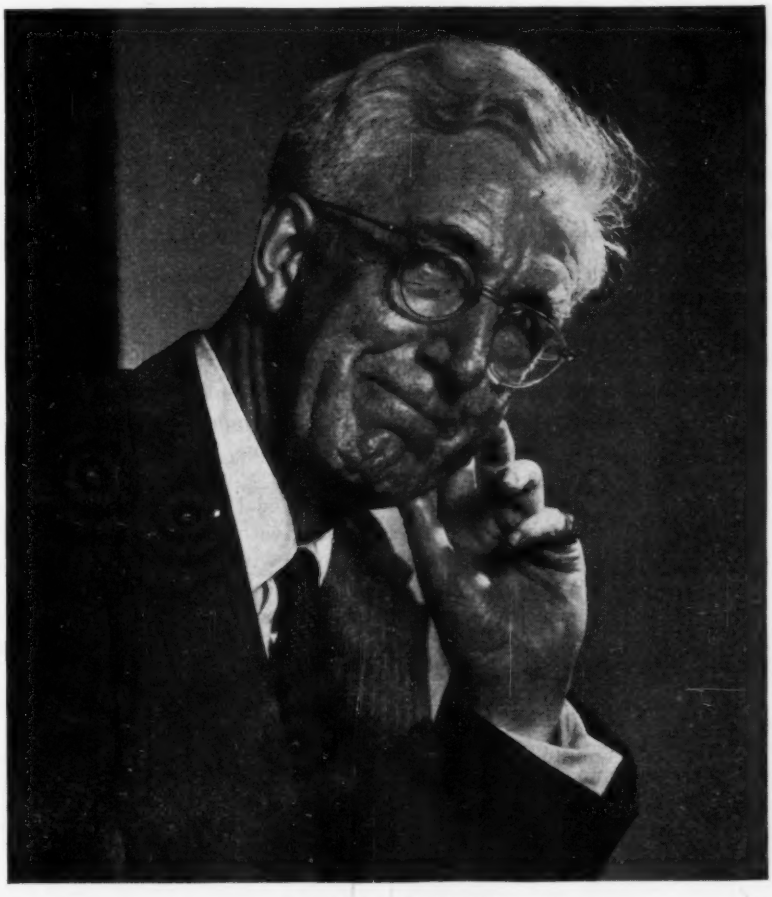
The award was made at the Annual Dinner in Cleveland on September 25 by President Carl B. Rix. He said:

"It is a custom of the American Bar Association to reward its servants for service with the bestowal of the Gold Medal of the Association, the most coveted award which can come to an American lawyer. This year that Medal goes to your friend and my friend. You know him as a friend, because of what he says to you so well each month through the columns of the JOURNAL. It is no secret to you that the Medal this year is awarded to Mr. William L. Ransom, of New York.

"If you will permit me, I shall read this citation to him:

"TO WILLIAM L. RANSOM

"SIR: In recognition of your outstanding services to the American Bar Association, the Board of Governors has authorized the bestowal on you of the coveted Gold Medal for



WILLIAM L. RANSOM

Distinguished and Meritorious Service. Out of the many and varied fields of endeavor in which you have been engaged for the Association, I shall speak only of these because of their outstanding qualities:

"1. To you goes the credit for the form of organization under which the Association is now operating so successfully. It was in your administration as President, and largely through your efforts, that the plan of organization was adopted.

"2. During the past years you have been the Chairman of the Committee for Peace and Law Through United Nations. You have acted as the accredited representative of the Association to the United Nations. You were active in the creation of the World Court and in the contribution of the Association to that great end. You are now heading the work of Progressive Development and Codification of International Law, in which the Association is destined to do its great and lasting part.

"3. You have served faithfully and well as a member of the Board of Editors of the AMERICAN BAR ASSOCIATION JOURNAL. During the past year you have been its highly efficient and devoted Editor-in-Chief. It is the expressed opinion of members from all States that the JOURNAL is making a profound contribution to the rapidly growing work of the Association.

"For these and many other evidences of highly efficient, loyal and unselfish devotion, I am proud to bestow upon you the Gold Medal of the American Bar Association."

Here is a list of the recipients of the Medal:

1929—Samuel Williston
1930—Elihu Root
1931—Oliver Wendell Holmes
1932—John H. Wigmore
1934—George W. Wickersham
1938—Herbert Harley
1939—Edgar B. Tolman
1940—Roscoe Pound
1941—George W. Pepper
1942—Charles E. Hughes
1943—John J. Parker
1944—Hatton W. Sumners
1946—Carl McFarland
1947—William L. Ransom

To this Mr. Ransom replied:

"I lack the words to respond as I should. What I feel is too deep to be put in words.

"I thank you, Mr. President, for what you have so generously said; and I thank all of you in the government of our Association, whose action has brought me to this moment in my life.

"You all know how I feel, and what I believe and have tried to do, about this Association. I am especially honored to have this bestowal from your hands, President Rix, because we are all a part of a further advance for which you sounded the call, and you have inspired and led, in large part, the work which it has been my privilege to put to paper in the JOURNAL.

"I cannot accept this Medal as merely for services or merits of mine. Much as I prize, and shall always cherish, this Award, I just feel lucky to be for the time in a place where I receive this tribute to work that has been done by many, in and for our Association.

"I shall not detain you from what you wish so much to hear. With all my heart I thank you all, and assure you of my everlasting debt to this Association, which already had honored me beyond all deserving. To it we may all, with pride and satisfaction, devote the utmost of our efforts in an hour when there is too little time left, I believe, for any of us to do less than all we can, in whatever capacity comes to us, for the things in which we profoundly believe."

Poetic Justice

■ We of the Editorial Board are constantly embarrassed by receiving credit for things accomplished singlehandedly by our Editor-in-Chief. We know him for an enemy of all pretense, a friend of all that is true, and, above all, a prodigy of a worker for what is right. When he was awarded the American Bar Association Medal at the Annual Dinner in Cleveland on September 25, he attempted, with characteristic modesty, to pass the credit on to others who had labored with him. All of his close associates and most of his acquaintances are ready to testify, however, to his phenomenal capacity to multiply one man's powers to the point where in every enterprise, he is able to take the laboring oar that his fellows are always wise enough to thrust into his willing hands. All who have ever worked with him rejoiced that, for once, it was possible to give credit where credit was due in the form of a medal that generous Judge Ransom could not split up into little pieces and distribute to associates who had been, compared to him, little more than benevolent bystanders. The applause that greeted the award reflected that feeling.

E. J. DIMOCK

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The Draft "Condemnation Rule":

Lawyers Are Asked To Make Known Their Views

■ The helpful and democratic method which has been followed with good results in the development of the Federal Rules of Civil Procedure in 1936-37, the Federal Rules of Criminal Procedure, and the improving amendments of the Civil Rules last year, has been the submission, under the authority of the Supreme Court, of a draft by the Advisory Committee to judges and members of the Bar throughout the country, with a request that the formulated draft be considered and discussed by all lawyers interested and that criticisms, comments, suggestions for improvement, etc., be transmitted to the Advisory Committee for its consideration. In 1936 and from time to time since then, our Association and its members have been of substantial assistance to the Advisory Committee in its perfecting of Rules. This has been done through "open forums" at Association meetings, at times, but chiefly through written communications directly to the Advisory Committee.

Another opportunity for our members to help by making known their views is now offered. In 1946 the Advisory Committee on Rules of Civil Procedure issued a preliminary draft of a federal "condemnation rule". This aroused considerable discussion in the *Journal* (32 A.B.A.J. 625-630 and 666) and at our Atlantic City meeting (33 A.B.A.J. 174). A revised draft has now been issued, and the criticisms and suggestions of the Bar are again invited. Neither the Supreme Court nor the Advisory Committee have approved this draft; they have authorized its distribution, to elicit the views of the Bar.

Copies of the draft may be obtained on request to the Advisory Committee on Rules for Civil Procedure, addressed to its office in the Supreme Court Building, Washington, D. C. Communications concerning the draft rule should be sent to the same address.

Questions presented by the proposed rule are important to lawyers and their clients. The problem of constituting the tribunal to award compensation is difficult as well as important. There is need for digging into several angles and giving constructive help. The purpose of the following article is to invite and urge our readers to give consideration to the matter and assist Chairman William D. Mitchell and his colleagues in the Advisory Committee in developing a sound and acceptable rule. The propensity of many lawyers to wait until new laws or regulations are in force before discovering them and becoming disturbed about them should not be yielded to in this instance. The desirable outcome is a further draft in the light of the suggestions and criticisms now received, and then a rule which can be submitted to the Court and to the Congress with the approval and support of the organized Bar.

■ As was forecasted in our October issue (page 1020), the Advisory Committee has extended to January 1 the time within which members of the Bar may submit their criticisms, suggestions, etc., as to the present draft of a federal "condemnation rule". If some suggestions are received shortly after January 1, they may be considered, although they would have to arrive in time for them to be mimeographed, analyzed by the staff, and distributed to Committee members, before the Advisory Committee meets to consider the matter. Its meeting has been tentatively set for February 2.

Lack of space prevents us from reprinting here the draft, with its various alternatives, etc. Our readers will have to obtain a pamphlet copy in order to study its provisions. The prefatory note in the Advisory Committee's brochure states well the central issues:

"We submit the draft to the profession at this time, expecting that suggestions from the bench and Bar will aid the Committee to reach sound conclusions on the points involved, and save time. We hope the profession will examine carefully every part of the draft, but especially

those provisions having to do with the constitution of the tribunal which fixes the compensation to the property owners. Acts of Congress relating to condemnation by some government agencies leave the constitution of tribunals to be governed by the State law. Some States provide for a board of three commissioners, with appeal to the district judge; other States provide for commissioners to make the initial award, with appeal to a jury. Some provide for a jury without previous award by commissioners. The law in the District of Columbia provides for a so-called jury of five to be appointed by the Court.

"The Act establishing the Tennessee Valley Authority provides for a commission of three, with appeal to and trial *de novo* before a three judge District Court, with appeal from that Court to a Circuit Court of Appeals which may make its own findings. A statement from counsel for the TVA respecting the operation of that system is hereto appended. As applied to situations such as the TVA, where large areas are condemned and uniformity of awards among properties of the same class is desirable, the TVA presents a rather impressive case for retention of its present system.

"The Department of Justice, on the other hand, prefers that in all cases trial of the amount of compensation be had in the first instance before a jury. Its argument is that trial by commissioners with appeal to a jury is an unnecessary and expensive duplication of trials and that a jury is preferable to a commission.

"Twice, bills presented to Congress by the Department of Justice, to provide for jury trials in all cases without prior awards by Commissioners, have been defeated. The *Congressional Record* indicates that the defeat of those bills resulted, in part, from the argument in Congress that the tribunal to award compensation should be that provided by State law, whether commissioners, jury, or both.

"Inquiry has been made by the Advisory Committee of all judges who have sat in TVA cases as to whether the TVA system is satisfactory. They generally approve it, the only feature to which there is considerable objection being the requirement for a three judge District Court to review commissioners' awards. In their responses some of the judges expressed preference for commissions, without a jury, not only in TVA cases, but in all condemnation cases.

"Apart from the question of the constitution of the tribunal to award compensation, we should be able to draft a uniform rule of procedure which will be generally satisfactory, but it is obvious that the Advisory Committee is faced with a difficult problem in respect of the character of the tribunal to award compensation.

"We start with the assumption that the rule should be uniform in all respects, except perhaps the constitution of the tribunal to award compensation. The questions then are:

"(1) Should the character of the tribunal to fix compensation be also uniform in all cases. If so, should it be a commission with appeal to a district judge, or a commission with appeal to a jury, or a jury without a commission?

"(2) Should the rule leave in effect such Acts of Congress as may prescribe the constitution of the tribunals to make the awards: If so, and where the tribunal is not prescribed by Act of Congress, should the tribunal be that prescribed by local law, or should it be prescribed by the rule, and in that case should it be a jury or a commission?

"Another alternative, not stated in the draft, would be to provide that the tribunal should be a commission with review by the district judge, but with power to the court in its discretion to order a jury trial on application of either party.

"That last suggestion, as a compromise, may satisfy the conflicting views of the Department of Justice, of agencies such as the TVA, as well as of Congress. It would enable the court to select the tribunal suitable for the type of case before it."

The background of the proposed Rule 71A, with reference to the previous drafts, is stated on pages 19-21 of the Advisory Committee's brochure, which contains informative notes as to the various provisions. A full statement of the TVA's position as to tribunal and form of trial, as made by its general counsel, is in the pamphlet (pages 15-19). The background for various alternatives broached by the sub-committee is given at pages 31-34.

Clearly the foregoing will suffice to suggest that the draft contains much that is important and controversial and that should elicit promptly for the benefit of the Advisory Committee the informed judgment of the Bar.

In the West Publishing Company's *Federal Rules Decisions* for October (Vol. 7—No. 3; pages 383-390), former President Walter P. Armstrong, of the Tennessee Bar (Memphis) contributes an extended discussion of "The Proposed Condemnation Rule" (7 F.R.D. 383).

1948 Annual Meeting

The Seventy-First Annual Meeting of the American Bar Association will be held in Seattle, Wash., the week of September 6, 1948. This will be our Association's first visit since 1928 to the Pacific Northwest for its Annual Meeting.

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Judicial Conferences:

Fifth, Eighth and Tenth Circuits

■ Completing our chronicles of the programs and proceedings of the 1947 Judicial Conferences in the Circuits, we report in this issue the Conferences in the Fifth, Eighth and Tenth Circuits. These Conferences have become an increasingly useful and significant institution. Members of the Bar in those Circuits and in other Circuits, will find in the reports much of interest. The proceedings of the Annual Conference of Senior Circuit Judges, convened by the Chief Justice at the end of September, will be published as soon as the Chief Justice issues his report.

Tenth Circuit Conference Discusses Subjects Useful to Practicing Lawyers

■ The Annual Judicial Conference of the Tenth Circuit, held in Denver on June 13, 14 and 16, was one of the most worthwhile ever convened in the Circuit. In addition to the judiciary, more than 125 lawyers from the six States comprising the Circuit were present.

The first day was devoted to "Co-operation Between the Bench, Bar, and Laymen to Improve the Administration of Justice". John G. Hervey, Executive Secretary of the Oklahoma Bar Association, and former Dean of the Oklahoma University Law School, gave a report on a questionnaire which he had sent to 500 persons who had served on juries in federal and State Courts in Oklahoma. Fifty-nine questionnaires were returned by jurors who had served in federal Courts, and 62 by jurors who had sat in State Courts. It contained questions to be answered by those who had been litigants and also questions with respect to their service as jurors. A majority of those who had been litigants in federal and State Courts felt that the judges who tried their cases were fair and impartial, and they were satisfied with the way their lawyer handled the case. They were of the opinion also that the instructions by the Court were fair, that the witnesses gave their testimony with reasonable clearness, and that the verdicts were fair and impartial.

Responses to the questions concerning service on juries indicated that a majority of the jurors questioned felt that the verdicts arrived at in the cases in which they served were fair and impartial, that the instructions by the Court were clear and were followed in a majority of the cases, and that the presiding judge was interested, had an open mind, and was impartial.

Walter E. Allen, prominent businessman and automobile dealer of Oklahoma City, gave the Conference a businessman's view of the administration of justice. He thought that the Courts should be conducted like any other successful business.

W. A. Bailey, Editor of the Kansas City *Kansan,* presented a newspaperman's views as to Courts. He was particularly critical of delays in the Courts, and suggested that there should be a tightening up on the part of judges in excusing individuals from jury service. He suggested that a greater respect for the Courts would be had if their physical quarters were improved, and placed considerable stress on the need that judges shall be men of high caliber and that the Bar shall make every effort to eliminate as far as can be the shyster lawyer and "ambulance chaser".

A. J. Chipman, General Chairman of the General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen, on the Denver & Rio Grande Western Railroad, gave the Conference his views from a labor leader's point of view. He said that he had the highest respect for the Courts but felt that administrative bodies are in a better position, through experience, closer contact with the laboring man, and specialization, to take care of most labor troubles.

Dean James F. Price, of the Law School of the University of Denver, Vance R. Dittman, Jr., Professor of Practice and Procedure, and Robert L. Gee, Professor of Public Law, at

the same institution, staged a panel discussion of Courts from the point of view of the teacher of law.

During the second day of the Conference, Max D. Melville, a member of the Colorado Bar for the past thirty-two years, spoke on the use of summary judgments and the discovery procedure. His address was a keen analysis of the cases arising in the Second and Tenth Circuits, wherein the use of summary judgments was applied. He pointed out the conflict in the cases arising out of the Tenth Circuit, as a result of the precedents laid down by an intra-Circuit conflict with the Second Circuit. The Tenth Circuit cases to which he referred as irreconcilable were *Schreffler* v. *Bowles,* 153 F. (2d) 1, and *Avrick* v. *Rockmont Envelope Co.,* 155 F. (2d) 568. Those in conflict in the Second Circuit were *Doehler Metal Co.* v. *U. S.,* 149 F. (2d) 130, and *Madeirense* v. *Stulman-Emrick Co.,* 147 F. (2d) 399. Mr. Melville pointed out that the *Avrick* case cited approvingly the *Doehler* case, in which the opinion was written by Judge Frank for a bench consisting of Judges Learned Hand, Chase, and Frank. The majority opinion in the *Madeirense* case was written by Judge Charles E. Clark, who had been a member of the Supreme Court's Advisory Committee on the Rules of Civil Procedure. Judge Clark wrote for himself and Judge Swan; Judge Frank filed a vigorous dissenting opinion.

The speaker summarized those cases by saying that those who adhere to the views of Judges Frank, Hand and Chase will maintain that in summary judgments an adversary must not be put under compulsion to deny what his opponent has stated under oath, because by vigorous cross-examination the jury may conclude that the affiant is not worthy of belief. On the other hand, those who hold with Judges Clark and Swan will be of the opinion that when a vital, dispositive matter is put in issue by affidavit, the adversary is under a duty to deny or explain under oath, or must suffer the consequences.

Robert E. Shelton, United States Attorney for the Western District of Oklahoma, addressed the Conference on the admissibility of confessions, on the trial of criminal cases. A great deal of stress was laid upon circumstances which control whether a confession was voluntary or whether it was secured through means that make it involuntary. He discussed and analyzed many cases, including *McNab* v. *U. S.,* 318 U. S. 322 and *Anderson* v. *U. S.,* 318 U. S. 350.

Henry P. Chandler, Director of the Administrative Office of the United States Courts, spoke concerning legislation affecting the Courts, and went into some detail as to what takes place before and in various committees of the Congress, especially the Committees on the Judiciary, concerning bills affecting the administration of justice, appropriations for the Courts, and related matters.

On the third day of the Conference, addresses were given by Duke Duvall, of the Bar of Oklahoma, on declaratory judgments, and by United States District Judge John A. Delehant, of Lincoln, Nebraska.

Mr. Duvall gave a paper on the declaratory judgment action. He traced exhaustively the history of its development, explained its nature, and set forth in detail the requisite conditions and precedents in order to obtain declaratory relief. Discretion of the trial Court in granting relief was carefully analyzed, and the advantages and use of the declaratory judgment were set forth in great detail.

Judge Delehant, in speaking "In Praise of the Impractical", oratorically expounded the lack of genuine scholarship in the advocate of today. He challenged general education for its almost complete abandonment of the cultural studies; also, the supplanting or supplementation of courses which long have been regarded as fundamental in the study of the law by courses which have been introduced in the curricula as an incident of the recent expansion of our system of jurisprudence into realms of the administrative, sociological, and political aspects of our fast-moving society. He proposed that the law student should again be intensively educated in the elemental principles of the law, with stress on the central subjects upon which the whole structure of jurisprudence rests, with a follow-up on practical courses and a wise but moderate regard for modern trends and changes.

Eighth Circuit Considers Legislation and Takes Steps for Economies

■ The Conference of Circuit and District Judges of the Eighth Circuit, as provided for in 28 USC §449, was held at Kansas City, Missouri, on May 22 and 23. Judge Archibald K. Gardner, of South Dakota, the new Senior Circuit Judge succeeding Judge Kimbrough Stone, retired, presided over his first Conference. Mr. Justice Rutledge, Circuit Justice for the Eighth Circuit, and Hatton W. Sumners, former chairman of the House Judiciary Committee, were guests of the Conference and addressed it briefly.

The sessions were devoted primarily to a consideration of various legislative proposals made by committees of the Judicial Conference of Senior Circuit Judges. By a divided vote, the Conference disapproved a proposed bill to authorize District Judges to allow United States Commissioners to accept pleas of guilty in cases of petty offenses and to impose sentences in such cases. The majority which disapproved the bill expressed the view that such legislation is unnecessary and undesirable and that it might also tend ultimately in the direction of fostering a federal police court set-up.

The Conference expressed itself also as being opposed to the creation of the office of public defender in federal Courts, as provided for in H. R. 5188, 79th Congress, and H. R. 514, 80th Congress, but resolved that if such legislation were to be enacted, the conference then favored the recommendation of the Judicial Conference of Senior Circuit Judges that there be embodied in the bill a

provision to make available to indigent defendants in criminal cases in the Circuit Courts of Appeals the services of the public defender and counsel provided for under Section 3 of the pending measure. In the case of indigent persons applying for *habeas corpus,* it was the view of the Conference that the matter of appointing counsel should be left wholly to the sound discretion of the Court.

On the *habeas Corpus* legislation proposed by the Committee of the Judicial Conference of Senior Circuit Judges, of which Committee Senior Circuit Judge John J. Parker, of the Fourth, is Chairman, the Conference approved the recommendations made by the Committee, except that it regarded it as unwise and unnecessary to make provision for a Court of three federal judges to hear applications for *habeas corpus* made by State prisoners.

The changes proposed by the Committee of the Conference of Senior Circuit Judges as to Rules 51, 52, 53 and 54 of the Supreme Court Rules in Admiralty were approved, as were also the changes proposed by the Committee as to Sections 57 (j) and 64 (a) (1) of the Bankruptcy Act and Section 116 of Chapter X.

Although the total expenses of the federal judicial system in entirety are a relatively small part of the aggregate National budget (see 33 A.B.A.J. 695; July, 1947) this and other Judicial Conferences have been concerned for economies. The following resolution was adopted by the Conference for the Eighth Circuit:

> It is the sense of this Conference that the National Courts should set an example for efficient and economical judicial administration. In order to ascertain whether the federal judicial business of this Circuit is being conducted by the Courts of the Circuit with the greatest possible efficiency and economy,
>
> BE IT RESOLVED that a Committee of three District Judges be appointed to consider what economies, if any, can be effected by the District Courts of the Circuit without impairing their efficiency, and to consider further what Congressional action, if any, is necessary or desirable to enable such Courts more effectively and economically to transact the business coming before them; and also that the Circuit Council of the Circuit be requested to consider the same problem in so far as it affects the administration of the Circuit Court of Appeals.
>
> BE IT FURTHER RESOLVED that the Judicial Conference of Senior Circuit Judges be requested to appoint a Committee to make a similar study of National scope.

Pursuant to this resolution, a Committee consisting of District Judges Delehant, Nordbye and Ridge was appointed by Senior Circuit Judge Gardner. This Committee has, through the course of the recent summer, made a study and a report in relation to the District Courts of the Circuit.

Conference for the Fifth Circuit Acts on Legislative Matters as to the Courts

■ On call of Senior Circuit Judge Samuel H. Sibley, the Judicial Conference for the Fifth Circuit convened, pursuant to 28 USC §449, on May 22 in New Orleans. The following judges were present:

Hugo L. Black, Circuit Justice
Samuel H. Sibley, Senior Circuit Judge
Joseph C. Hutcheson, Jr., Circuit Judge
Leon McCord, Circuit Judge
Curtis L. Waller, Circuit Judge
Elmo P. Lee, Circuit Judge
Clarence Mullins, District Judge
Seybourn Lynne, District Judge
John McDuffie, District Judge
William J. Barker, District Judge
John W. Holland, District Judge
Dozier A. DeVane, District Judge
T. Whitfield Davidson, District Judge
Thomas M. Kennerly, District Judge
Randolph Bryant, District Judge
Ben H. Rice, Jr., District Judge
E. Marvin Underwood, District Judge
Robert L. Russell, District Judge
T. Hoyt Davis, District Judge
Frank M. Scarlett, District Judge
Wayne G. Borah, District Judge
Benjamin C. Dawkins, District Judge
Gaston L. Porterie, District Judge
Allen Cox, District Judge
Sidney C. Mize, District Judge

The following delegates from the Bar attended:

Robert Troutman and Charles J. Bloch, of the Georgia Bar; G. W. Parker, Jr., Larry W. Morris, W. B. Harrell, and W. Fred Weeks, of the Texas Bar; H. Payne Breazelle, Sumter D. Marks, Jr., and Fred G. Hudson, of the Louisiana Bar; DeVane K. Jones and Francis T. Inge, of the Alabama Bar; Francis P. Whitehair, of the Florida Bar; and Fulton Thompson and Lester Clark of the Mississippi Bar.

At the opening session on the morning of May 22, Judge Sibley announced that the suggestion of the 1946 Conference regarding *en banc* sittings of the Circuit Court of Appeals had been considered by the Circuit Judges and that no change regarding *en banc* sittings was made.

Fred G. Hudson, of the Louisiana Bar, delivered an address on "Title IV of the Legislative Reorganization Act of 1946, known as 'Federal Tort Claims Act' ". This was followed by a general discussion.

Circuit Judge Joseph C. Hutcheson, Jr., spoke on "The Administrative Procedure Act". A general discussion followed.

On motion of District Judge Porterie, members of the Conference stood and observed a minute of silence in memory of the late Judge Adrian J. Calliouet, who died on December 19, 1946, while serving as United States District Judge for the Eastern District of Louisiana.

During the noon recess, members of the Conference attended a luncheon at the St. Charles Hotel. Mr. Justice Hugo L. Black, of the Supreme Court gave an informal address.

When the Conference reconvened, Judge Sibley announced that the Administrative Office had advised him of an urgent need for District Judges to serve in districts in the East in the autumn. Judge Sibley asked that any District Judges who could serve in those congested districts notify him of their availability.

Richard A. Chappell, Chief of

Probation, delivered an address on "Federal Probation: Its Progress and Problems". This was followed by a general discussion.

Elmore Whitehurst, Assistant Director of the Administrative Office, spoke on "The Plan of the Administrative Office for Determining Allowances for the Conduct of Referees' Offices, Rents, Clerk's Hire, etc." A general discussion ensued. Mr. Whitehurst also conveyed to the Conference the greetings of Henry P. Chandler, Director of the Administrative Office.

Judge Holland, Chairman of the Committee on Legislation, announced that individual members of his committee would make reports on pending legislation. Judge Russell discussed H. R. 2055, to revise, codify, and enact into law Title 28 of the United States Code entitled "Judicial Code and Judiciary". He commented that the Conference had approved the bill, with minor suggestions, last year, but that the suggestions had not been adopted by Congress. He advised that the bill as presently written would soon be passed, and he recommended that the Conference take no further action. This was voted.

Judge Russell next discussed H. R. 2746, a bill to provide statutory authority for appointment of secretaries for circuit and district judges. There is no present statutory authority for such appointments, provision for them being made annually in the appropriation bill. The Conference approved the bill.

Judge McDuffie presented H. R. 2519 (S. 850), a bill to provide for the care and custody of insane persons charged with or convicted of offenses against the United States. The Conference voted to approve the bill, as it had done last year.

Judge McDuffie discussed also H. R. 2766, which provides, among other things, for the transfer of jurisdiction of a probationer from one district to another. Judge McDuffie suggested that in such cases it might be wise to secure a waiver from the probationer. Discussion was had on this point, but no motion was made. It was voted that it was the sense of the Conference that the bill be approved in principle.

Judge McDuffie presented H. R. 2767, a bill to provide for the setting aside of convictions of federal offenders who have been placed on probation and have fully complied with the conditions of their probation. There was an extended discussion of the measure. Judge Holland, seconded by Judge Mize, moved that the Conference disapprove it. Judge Hutcheson, seconded by Judge Russell, moved to substitute a motion to approve. The motion to substitute was lost by a standing vote of 16 to 11. Vote was then had on the motion to disapprove the bill. The motion to disapprove was carried by a vote of 16 to 11. Judge Hutcheson requested the Senior Circuit Judge to report the divided vote when he made his report to the Judicial Conference. On May 23 the Conference voted to approve the bill in principle.

Judge Mize discussed H. R. 1468 and H. R. 1470, bills to provide for the review of certain orders of the Interstate Commerce Commission, the United States Maritime Commission, the Federal Communications Commission, and other orders. Judge Mize said the legislation had been approved at the 1946 Conference and moved that the Conference take no further action. This was carried.

Judge Mize discussed proposed legislation on habeas corpus procedure. Statutes "A" and "B" were discussed in detail—Statute "A" being commonly referred to as "the jurisdictional bill", and Statute "B" being commonly referred to as "the precedural bill". Statute "X", another "jurisdictional bill", was discussed. Statutes "A" and "B" were approved by the Conference and Statute "X" was disapproved.

Judge Mize discussed H. B. 943, a bill to fix qualifications of jurors. This bill was disapproved by the Legislative Committee, which thought that the present system of qualification should not be disturbed. The Conference voted its disapproval of the bill.

With Circuit Judge Waller presiding, Judge Mize presented H. B. 944, a bill to provide a jury commission for each District Court, to regulate its compensation, etc. A motion for approval of the bill was lost, and the Conference disapproved the legislation. Judge Mize also outlined H. B. 945, relating to the payment of fees, expenses, and costs of jurors. The Conference approved the bill. The Conference recessed then until the following morning.

On May 23, with Judge Waller again presiding, Judge Dawkins discussed proposed amendments of Section 64 (b) of the Bankruptcy Act. The Conference voted approval of the proposed amendments. Judge Dawkins also discussed legislation to make permanent Section 75 dealing with farmers' bankruptcy. The proposed legislation will give to Referees the duties now performed by conciliation commissioners. The Conference voted approval of this legislation also.

Judge Dawkins discussed also the situation with regard to Court Reporters. He said that due to inadequacy of compensation, there was danger of losing many competent reporters. He suggested that judges having reporter problems make direct appeals to the Administrative Office for relief. No action was taken by the Conference.

Judge Kennerly observed that last year the Conference voted disapproval of the so-called "Youth Offender Bill", with an amendment, and that thereafter the bill was approved by the Judicial Conference of Senior Circuit Judges and is pending in the Congress. No further action was taken by the Conference.

Judge Kennerly discussed proposed legislation with reference to regulation of admissions to the Bar of federal Courts. It was voted that it was the sense of the Conference that it is satisfied with the present system which allows each of the District Courts to fix qualifications for admission and to provide for the suspenson of persons admitted to practice before such Courts.

With Judge Sibley presiding, George W. Parker, Jr., of the Texas

Bar, delivered an address and led a discussion on "Rules of the Fifth Circuit Court of Appeals for Preparing and Printing of Records". The discussion centered around the cost of printing or mimeographing records and the tendency of lawyers to designate for printing much unnecessary matter.

Judge Mize brought up for further discussion the bill providing for the setting aside of convictions of probationers who have fully complied with the conditions of their probation. He said that he was of opinion that the Conference members approved the sense of the bill but thought it to be unconstitutional. Judge Mize moved that "While the Conference disapproved the bill, it approves the principle of the bill". This motion was carried.

Francis P. Whitehair, of the Florida Bar, gave the Conference "Some Suggestions for the Elimination or Reduction of Publication of Unnecessary Opinions". His address was published in full in our August issue (page 751). His submission was followed by a discussion of it. Judge Sibley suggested that the Circuit Court of Appeals had no right to curtail the publication of any of its opinions by private publishers. Judge Hutcheson made a motion, seconded by Judge McDuffie, to determine the sense of the Conference as to whether the Court should give its reasons when an appeal is disposed of by *per curiam* opinion. The motion was tabled.

Judge Sibley called for reports of standing committees of the Conference:

Committee on Conference Rules
Committee on Rules of Civil Procedure
Committee on Rules of Criminal Procedure

Judge McDuffie suggested that the rule providing a 60-day limit within which an order can be changed should be changed. On his motion it was voted that it was the sense of the Conference that the rule be changed so that an order could be changed, either during the term or within 60 days, whichever period was longer.

Judge Cox made the report of the Committee on Criminal Procedure. The report suggested a change in Section d of Rule 17. Other observations were made in the report. The report was accepted and approved.

Judge Underwood made the report of the Committee on Bankruptcy. The report referred to the Referee's Salary Bill and the requirement that the clerk collect fees before filing the petition. The Committee urged that a general order be promulgated to permit a debtor to secure the protection of the bankruptcy Court without the prepayment of fees. The report was accepted and approved by the Conference.

Judge Mullins delivered the report of the Resolutions Committee. By a standing vote the Conference unanimously adopted a resolution: "Memorial of Adrian J. Calliouet".

By unanimous vote the Conference adopted a resolution of thanks to the Board of Port Commissioners of the Port of New Orleans for its "generous and hospitable entertainment" in providing a luncheon and boat ride for the judges and lawyer delegates and their wives.

Judge Sibley thanked the Committees and the leaders of discussions for their contributions to the Conference. Judge McCord paid tribute to Judge Sibley for his splendid leadership, and expressed to Mr. Justice Black the pleasure of the Conference in having him in attendance. The latter replied the Conference had been of benefit to him and that he expected to attend all future Conferences.

At noon the Conference adjourned, and the judges, the lawyer delegates, and their wives, were guests of the Board of Commissioners of the Port of New Orleans at a luncheon and harbor trip aboard the S. S. *Good Neighbor*.

House of Delegates To Meet Again February 23-25

▪ The mid-winter meeting of the House of Delegates has been called by the Board of Governors to convene at the Edgewater Beach Hotel in Chicago, with the opening session at 10 o'clock on Monday morning, February 23, and the sessions continuing through Wednesday, February 25.

The meeting of the State Delegates to make their nominations for President and other Association officers and three members of the Board of Governors will be held at 9 o'clock on Tuesday morning, February 24.

Preliminary to the meeting of the House of Delegates, the Board of Governors will be convened by President Tappan Gregory at 10 o'clock on Friday morning, February 21, and will continue its sessions on Saturday and Sunday, February 22 and 23.

Before then, however, the Board of Governors will meet, also at the Edgewater Beach Hotel, on Friday and Saturday, November 7 and 8. The yearly meeting of the Chairmen of Association Sections with the members of the Board of Governors will be held on Sunday, November 9, at the Edgewater Beach Hotel.

THE PRESIDENT'S PAGE

TAPPAN GREGORY

■ We live in difficult times. Agreeing as we do that our Nation cannot stand aloof from participation in international affairs, we are bound to recognize that the American Bar Association must be vigilant and assume an active role if the Bar is to maintain its leadership in affairs of state.

The hope of peace in the world rests on a better understanding by the people of all nations that this cannot be without freedom and justice, and that these cannot exist except under law—not law by dictate of higher authority, but fair and just and rational and acceptable to the governed.

Under the guise of war emergency, we in this country have given much already to the strengthening of a powerful centralized government—too much, perhaps. Encroachments upon our rights and liberties creep upon us insidiously. Acceptance by us of these changes at home gives courage to those who would glorify the state in international affairs and degrade the individual. Progress abroad in this direction brings closer and closer to our shores this stealthy threat to the very structure of our Republic. If it gives way, we have no freedom; without freedom, there can be no peace, for serfdom is worse than death; without peace, social reforms are meaningless. In this eternal fight for freedom and law, in this everlasting struggle against those who would destroy us for the advantage of dictatorship, the arena is world-wide and the burden of defense rests largely on the shoulders of the Bar. We are trained to the task; we are educated in the subject. We must seek to arouse those who are indifferent, to crystallize public opinion, to sound the call to action.

It is not easy for lawyers whose homes and offices have been largely destroyed, whose books are gone, who no longer possess other tools of their profession, typewriters and even paper, for example, to carry on and aid in resisting attacks on the ways of democracy. Yet none is better endowed, given means to maintain himself in reasonable comfort and security, to strengthen our cause than is the lawyer.

That the possibilities inherent in our relationship with lawyers in the democracies of Europe might be explored, Carl Rix appointed last year a distinguished committee of three former presidents of our Association. It was entitled the Special Committee on Aid to Lawyers in Devastated Countries. Its Chairman, Jacob M. Lashly, of Missouri, visited France and Italy and the American Colony in Berlin. He presented a moving report to our House of Delegates in Cleveland last month. Now he speaks to you direct through the columns of this page. This is what he tells us of the results of his trip, and the manner in which he hopes we may plan and carry out some measure of assistance:

Committee Requests Sampling of Opinion

The Special Committee requires the advice of interested members of the Association. Our survey of existing conditions shows clearly that the Bars of France and Italy have been deprived and despoiled of many of the necessary implements for carrying on their work. During the war and occupation, there was no book printing, paper supplies were exhausted or seriously depleted, and many typewriters were destroyed or removed. There is little prospect of replenishment from their own resources within any time now foreseeable.

The House of Delegates has authorized the selection of a good-will delegation to contact or visit the Bars of these and other countries, within their discretion. Any effort toward practical assistance to the greatest sufferers among them would be graciously received and fully appreciated by the entire body of these groups whose influence is powerful both within and without the governments. Various suggestions of helpfulness have been received, some of which seem feasible.

It would be possible to furnish one or more small working libraries of American law books for the use of the indigenous Bars of these countries. A gesture such as this would create an especially good impression just at this time. Our information is that the Surplus Property Act, sometimes known as the Fulbright Bill, is in process of implementation by agreements between the State Department and the foreign countries concerned, and may be expected to be made effective within a reasonably short time. Through the administration of this law, an exchange cultural program of unprecedented dimensions will be financed from portions of the take-over value of surplus property left in the Allied countries at the close of hostilities. Library assistance and other cooperative measures for presenting the subjects of American history, government and law in their institutions of higher learning, will be a legitimate field for activities of our Association as a supplement to the work of the official agencies, when that program shall have begun to function.

New typewriters are becoming available in our country now, and used ones are being turned in or exchanged in increasing volume. These exchange machines might be overhauled, the type changed so as to be made suitable for foreign language service, and furnished to their Bar organizations for discriminating and carefully super-

vised distribution, upon such terms and conditions as could be devised for properly safeguarding our purposes.

Such a substantial and efficient show of friendship would undoubtedly be received by our brethren of these foreign Bars with great appreciation, both of the spirit which prompted the gifts and of such a concrete demonstration of our interest in them. Of this we have been assured.

The ideological conflict in Europe is acute today beyond any power of understanding by those of us who are accustomed to experience such things only in its more philosophic aspects. Since the recent arrogant re-emergence of the Comintern, the struggle is desperate and the pressure intense. This threat is pointed directly and immediately at the European countries —ultimately at the United States.

The choice of two ways of life is between ruthless realism and practical idealism. The devastated countries cannot yet go on alone. Right-intentioned leaders need support to enable them to stand up to the enemies of peace and order. Neglected and desperate people require encouragement to generate hope and faith—fear is there already. The crisis is just as real now as it was when our boys were hurrying up the beaches of Normandy.

What the Committee is asking is this: "Shall the American Bar Association associate itself with the efforts of our country, and the other democracies, and the moral forces of the world, in winning the 'cold war'? If so, is this the way to do it?" It would involve some sacrifices upon the part of local Associations, individual lawyers, law firms, and law book publishers, from whom the typewriters, the law books, and some money for essential expenses, would have to come as a free-will offering of those who wish to have a part in a challenging enterprise such as this. Your Committee wishes to be guided in making its plans by the nature of the responses to this inquiry. Please direct your responses to the undersigned Committee at Association Headquarters at Chicago.

JOSEPH W. HENDERSON
WILLIS SMITH
JACOB M. LASHLY, Chairman,
Special Committee in Aid of Lawyers in Devastated Countries.

* * *

The Joint Committee on Continuing Education of the Bar, composed of representatives of the American Law Institute and the American Bar Association, is scheduled to meet in Chicago, probably before this issue of the JOURNAL comes to your desks. The American Law Institute, assuming reponsibility for financing the excellent program contemplated, is authorized to designate twelve of the twenty members of this committee. The American Bar Association will appoint eight, four from the Section of Legal Education, two from the Junior Bar Conference, and two from the Section of Bar Activities.

* * *

Two meetings have already been held of the Council of the Survey of the Legal Profession. The method by which the work is to be financed, and the scope of the survey and the manner of its operation, were comprehensively presented by Arthur T. Vanderbilt, the Director of the Survey, in his clear and forceful address before the Assembly in Cleveland. Announcement of definitive plans is in the leading article in this issue.

* * *

During the last two days of September there was held in New York City a Conference on the Citizen's Participation in Public Affairs. It was called by Dean Vanderbilt, and conducted under the auspices of the American Bar Association, the American Political Science Association, and the School of Law of New York University. It marked the inauguration of the Citizenship Clearing House at Dean Vanderbilt's law school. The American Bar Association was represented by Mr. Rix and me and a number of members of our new committee on Participation by Lawyers as Citizens in Public Affairs.

* * *

By the foregoing activities we hope to extend our influence abroad; to assist lawyers in this country who have been away on service with the Armed Forces, to pick up the threads of their practice under good auspices; to help those who find themselves in some special fields to greater familiarity with the law and the rules of their specialties; to encourage and make possible useful activity in public affairs by lawyers, and finally, over a period of years, to explore the status of the members of the Bar, the needs of legal education, and how the lot of the average lawyer may be improved and all of us may be better equipped to discharge our obligations towards clients and public.

1948 Ross Essay Subject as to American Federal System

▪ In line with Judge Julian P. Alexander's notable article and an accompanying editorial in our January issue (pages 3-6, 78-81) and in furtherance of the objectives of Senator Pat MacCarran's constructive bill and statement on the floor of the Senate (see our June issue, pages 525-528) the Board of Governors of our Association has unanimously selected the following subject for the 1948 competition for the Essay Prize established by the will of the late Judge Erskine M. Ross, of California: "What Steps Should Be Taken to Preserve the American Federal System and Restore the Powers and Responsibilities to the State and Local Governments?" Official announcement of the conditions of the 1948 competition is published on the inside back cover of this issue. Attention is directed to it for details.

AMERICAN BAR ASSOCIATION
Journal

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1140 North Dearborn Street.....Chicago 10, Ill.

■ *"I Have Never Appointed a Member of My Own Party" to The Bench*

The first item of the striking sentences and short paragraphs which we culled from addresses at our Cleveland meeting (see page 1082) is from the Lord Chancellor of Great Britain, Viscount Jowitt. It arrested our attention to such an extent that it seemed worthy of brief analysis, because of what it may suggest as to the selection of judges in the United States. He said:

(1) That as the highest judicial officer of Britain he appoints all of the judges, from the highest to the lowest Courts.

(2) That he is the best qualified person to do this, because he sits in and hears cases and sees the lawyers in action, and so can best judge of their fitness for judicial office and get the best man for the place.

(3) That he has never permitted any political consideration to enter in the slightest degree into his selection of any man for the bench.

(4) That he has never appointed a lawyer to the bench until he has discussed him with the judges of the Court or division in which his nominee would sit.

(5) That he has never appointed a member of his own political party (the Labor party) to a judgeship.

Those who have the appointing power as to judicial offices in America could do much for their country and its judicial system if they would accept and follow all or most of the standards and procedures declared by the Lord Chancellor. Some day a President of the United States will extirpate partisanship, root and branch, as a factor in the selection of judges. He will not bar members of his own party—or of any other party—if they possess the experience at the Bar, the proficiency in the law, the innate sense of justice, and the attributes of impartiality, independence and courage, which qualify men to become judges. We do not understand that the Lord Chancellor has refused or failed to appoint to the bench lawyers of the Labor Party *because* they were members of his own political party.

■ *Prompt Agreement on a Plan Is Needed*

Members of our Association and our profession have a right to expect team-work, agreement on a practicable plan, and concerted action for it, on the part of the two Sections of the Association which have been considering the remedial steps to be taken for the relief of members of professions and partners in unincorporated businesses from the severe inequities and injustices which now rest upon them under federal tax laws and regulations. The problem is a major and urgent task of the Association, and the respective Committees of the two Sections ought to get together, make the necessary decisions, and go to bat for an agreed-on plan, without delay.

The Section of Corporation, Banking and Mercantile Law opened the subject through John R. Nicholson's article in our April issue (page 302). Harry J. Rudick, for a group in the Section of Taxation, offered in our October issue (page 1001) an alternative to Mr. Nicholson's proposal; and Mr. Nicholson commented on it. There is also a "Silverson proposal", on which Mr. Rudick commented, and as to which a Committee of the Section of Taxation offered some criticisms and changes in Cleveland.

President Harrison Tweed, of the Association of the Bar of the City of New York, was frankly critical, in his recent annual report, of "the discrimination against the professional worker who earns his living", and "the difficulties which face the lawyer who practices law alone or as a member of a firm, in an attempt to build up a fund for his old age or for his widow—to disregard descendants altogether—when compared with the opportunities offered by the tax statute to a corporation in the way of pensions or insurance" (*The Record*, Vol. 2—No. 7; page 271; October, 1947). He announced that a special committee of that Association "will go to work on this". State and local Bar Associations can and should help, with constructive suggestions; but the American Bar Association should take the lead and be the clearing house for ideas, as well as the final drafting agency.

The issue is one of simple and practicable justice for lawyers and other members of professions—not a question of "social objectives" or conflicting "philosophies" of taxation or pride of origin of ideas. There is abun-

dant reason to expect action and results. The two Committees in the respective Sections could well, we think, be empowered and instructed to act as a joint Committee in behalf of our Association, to work out the best possible plan without delay and get behind it.

■ 150 Words

The opening of files of Abraham Lincoln's papers has revealed, and the Freedom Train has brought to us, his handwritten draft for his famed "farewell" to his neighbors from the end of a train in Springfield, when the Illinois lawyer left for Washington to become President.

Newspaper versions of the speech, doubtless taken down in long-hand under conditions unfavorable for reporting, have sounded a bit mawkish in spots. There were no mimeographed "hand-outs" of speeches in those days, no radio broadcasts. We may experience a nostalgia for an era when even an incoming President wrote out such a speech in his own hand but did not give it to the press.

Now that we have the labored draft, we become aware that those of us who have occasion to speak in public could do no better than to have this utterance in mind as a classic model of simplicity and brevity, along with nobility of thought. Here indeed are the most lofty thoughts that can come to the mind of man—practically all of them are in it in the briefest compass:

> My friends:
>
> No one not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people I owe everything. Here I have lived a quarter of a century and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave not knowing when, or whether ever I may return, with a task before me greater than that which rested upon Washington. Without the assistance of that Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail. Trusting in Him, who can go with me, and remain with you and be everywhere for good, let us confidently hope that all will yet be well. To His care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.

In these troubling days, when many an utterance which is read to us by radio or in public assembly sounds like that of a "man on a flying trapeze" of words and moods, we are glad to be reminded of the art and moving sincerity of the great Illinois lawyer. Sir Norman Birkett of England, in an unforgettable address which we shall soon publish, gave instance after instance to show that the art and skill of the truly great advocate require simplicity and clarity in questioning and argument.

There comes to mind, too, General Montgomery's great farewell to his Eighth Army. "Since I have commanded this Army," he said, "I have never given a written order about operations. Command must be personal and it must be verbal, so much depends on the human factor in this war."

General Montgomery added that he often had in mind the eternal counsel of the New Testament: "Except ye utter by the tongue words easy to be understood, how shall it be known what is spoken?"

■ A Congressional Hearing Is Not a "Trial" in "Court"

We hope that lawyers in all communities were "on the job" to explain to laymen the lack of basis for the hue and cry set up by Left Wing newspapers and Communist spokesmen in this country, and widely echoed here and abroad, that, as one paper put it, "Movie Inquiry Is a Hitler Court". The attempt to deceive by ignoring the constitutional division of our federal republic into three branches and by imputing unfair-

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ness to a legislative committee if it does not follow our traditional procedures where the trial of named persons is taking place before a Court and jury after an indictment by a grand jury, was hardly unintentional; but it may have repercussions among those who do not understand the constitutional separation of powers and the latitudes allowed to legislative committees in their inquiries as to what legislation, if any, is desirable to protect public rights.

Whatever may have been the doubtful features of the motion-picture inquiry by the House of Representatives Committee—we shall comment on some of them—there was no analogy to the "People's Courts" under the Hitler regime. Possible analogy to Moscow "purge" trials under Vishinsky was not suggested by Communist critics of the hearings and would have been equally unwarranted.

A Committee of the American Congress is not a creature of the Executive branch of government, as were the "Hitler Courts", not an "organ of government vengeance", to use the phrase which Mr. Justice Jackson quoted as to Soviet Courts (33 A.B.A.J. 24, at 87). Such a committee has no power to send men and women to their death, or to punish anyone at all, or to determine guilt or innocence. Its purpose is to develop and disclose conditions which may need legislative remedy and to put the Congress in a position to decide on and draft any such legislation. The constitutional provisions to which critics of the inquiry so earnestly refer are specifically entitled "civil rights in trials for crimes enumerated"; the requirement is that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation", etc. A legislative inquiry is not a criminal prosecution, but the American concepts of fair play still hold good.

Those who inveighed most loudly against the unfairness of the present Committee's inquiry to determine what, if any, legislation is needed to "outlaw" the Communist party or curb the Comintern's infiltration of the media of mass communication in this country made no such protests when the banking industry was investigated under similar fashion by the Pujo Committee and Samuel Untermeyer, or when the Stock Exchange was investigated by a House Committee and Ferdinand Pecora, or when the oil industry and "Teapot Dome" were investigated by a Senate Committee and Thomas J. Walsh, or when a Senate Committee and Senator Hugo Black denied the claimed privileges and privacy of law office files, or when Senator Harry S. Truman won Nationwide attention through his senatorial investigation, under similar procedure, of wartime expenditures and wastes.

Committees in the American House of Representatives are made up of men and women elected by the people in many districts, are made up of members of both political parties, and are under the duty of seeking information and judgment on which they can draft and pass laws for the protection of free institutions in their country. In this instance the House Committee is seeking to find out what laws, if any, may be needed to prevent an organized Communist propaganda from misusing a great industry as means of poisoning American public opinion and inculcating the collectivism which would undermine our institutions. Such an inquiry by such a Committee has no resemblance to "Hitler Courts" or Moscow "purge trials". How far would the practices complained of so loudly as to this House Committee have been avoided in the Soviet Union or any of the countries now dominated from Moscow?

Having said all this, we recognize, as no doubt the lawyers in the House Committee recognize, some dangers which are inherent in the highly-publicized proceedings had up to this writing (October 25)—dangers to the American concepts of fair play. Even in the great court of public opinion, persons should not be subjected to popular condemnation without an opportunity to be heard and to present witnesses. This would be just as objectionable as to alleged Communists as it was as to American bankers or oil men or stockbrokers.

The vital things here and now are the thorough "exposure" of the extent of the Communist conspiracy against our institutions and the way it operates—how else could all the people know about it?—and also the carrying forward of this "exposure" in a manner that does not violate "the rudiments of fair play". The task is not easy when many of the most brilliant and highly-paid beneficiaries of our private-enterprise system combine their talents to block and "smear" it.

The motion-picture industry in America is as much the victim of the Communist infiltration as governmental agencies, even the State Department, and the labor unions, have been. There has been no evidence that, if what has been taking place is made known and proper legislation is enacted and public support given, the motion-picture industry will not "put its own house in order". The legislation needs to be directed against organized foreign interference with sources of public information and opinion—in this instance, the motion pictures.

Such an inquiry needs to be held scrupulously to its specific legislative objective. To permit it to roam at will and take up whatever it pleases, and to let witnesses accuse whomever they please, would not jibe with American fair play. Independence of thinking and action cannot be permitted to be condemned and "smeared" in America by putting on it either of the closely similar labels of Communism or fascism. At almost any hazard, the channels of public information must be kept open, and must be kept unpolluted as well.

Finally, the guilt of persons mentioned at the hearings should not be assumed by the American public. The revelation of a system and a public danger against

which legislation may be directed should not obscure the fact that for individuals the outcome should assure tribunals and statutes under which persons believed to be guilty of warfare and conspiracy against our government will be given a fair trial according to all of the requirements of "due process" which is so invariably denied in countries dominated by the philosophy of those who have so glibly called a Committee of the American Congress a "Hitler Court".

■ Set-Back for International Law

As was to be expected, the deterioration in international relations and the *impasse* in the United Nations have had effects on the recommended plans and time schedule (see 33 A.B.A.J. 621 and 831; June and August, 1947 issues) for the progressive development and statement of international law and its eventful codification. The Delegation of the United States in the General Assembly has taken the lead in helping to work out a substitute plan to enable some headway to be maintained despite the crisis.

The opinion prevalent in the General Assembly appears to be that the present state of the world is not favorable for the nomination and election of jurisconsults of the highest type, to constitute the International Law Commission. In the ascendant mood for strengthening the General Assembly and confining the Security Council closely to its specified functions, under the Charter, for taking steps to prevent aggression and threats to security and to keep the peace, there appears to be understandably an aversion to assigning to the Security Council any part in the election of members of the International Law Commission when it is created. The Statute of the World Court (Articles 7-12) provides for bicameral election of Judges, but Article 13 (1) vests only the General Assembly with powers and duties as to the development and codification of international law.

There is a substantial body of opinion, in the American Delegation and among others in the Assembly, that men of the experience and standing needed for the International Law Commission cannot be obtained on a full-time basis, which the Assembly's Committee on plan recommended. It is believed that with much of the work in its preliminary stages necessarily entrusted to expert staffs and accredited organizations, better men can be secured for the ILC on a part-time basis. Conceivably this will mean a Commission made up in part of members whose primary duties are in and to their respective governments.

The calendar of the Assembly is heavily congested with matters on which the future of the United Nations and world peace may depend. The tenor and temper of the debates at this second regular session of the Assembly have hardly contributed to peace, amity and cooperation among the Nations. Strong support is manfested for a November adjournment until at least January, which would mean the indefinite postponement of many items on the calendar.

The upshot of it all seems to be that the ILC will not be nominated and elected, and probably not even created, in 1947 or early 1948, and that instead an interim Commission of part-time members will be created in some manner, to proceed with the preparatory work, with the considerable aid of the Legal Secretariat, until such time as circumstances are more favorable for setting up the ILC. Such a change in plan or timing will of course be disappointing and deplorable, from the point of view of those who believe, as our Association does, that the world needs most the setting up of the rule of law and adjudication in the place of acrimonious debates at "the political level". The force of the practical considerations which may dictate such a change can hardly be gainsaid.

■ Judicial "Deference" to Administrative Agency "Experience"

The attention of the Bar and country was caught by the vigorous dissenting opinion filed on October 6 by Mr. Justice Robert H. Jackson, with whom Mr. Justice Frankfurter concurred, in *Securities and Exchange Commission* v. *Chenery*. The decision of the Court had been rendered late in June. For lack of time, the two dissenting members of the Court reserved until the opening of the new term the filing of their grounds of dissent. The opinion so filed brings into the foreground of administrative law the vital issue which Dean Roscoe Pound and others have been discussing so trenchantly, as to the extent of "judicial deference to administrative experience" where the Congress has prescribed no standard for the agency to apply and has vested the agency with no express discretion or authority to set up its own standard.

Pointing out that the Court "by this present decision sustains the identical administrative order which only recently it held invalid. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80", and that the Court correctly noted that the Commission has only "recast its rationale and reached the same result", Mr. Justice Jackson said that "it is clear that there has been a shift in attitude between that of the controlling membership of the Court when the case was first here and that of those who have the power of decision on this second review." Between the first and the second decision, Chief Justice Stone died and Mr. Justice Roberts retired from the Court. They were succeeded, respectively, by Chief Justice Vinson and Mr. Justice Burton. In the Court of Appeals for the District of Columbia, the order of the SEC was reversed both times, with Chief Judge Groner writing for the Court before (128 F. (2d) 303) and after (154 F. (2d) 6) the Commission "recast its rationale."

In the Supreme Court on June 23, Mr. Justice Murphy

delivered the opinion of the Court. Chief Justice Vinson and Mr. Justice Douglas took no part in the consideration or decision of the case. Mr. Justice Burton concurred in the result. With the two votes in dissent, the opinion of the Court was rendered by Justices Murphy, Black, Reed and Rutledge. The grounds of the Court's decision were stated in our "Review of Recent Supreme Court Decisions" (October issue, page 1039).

Disagreeing with the reasoning offered "to rationalize this shift" in the Supreme Court on the question of administrative law, Mr. Justice Jackson said:

> It makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to a mere feint. While the opinion does not have the adherence of a majority of the full Court, if its pronouncements should become governing principles they would, in practice, put most administrative orders over and above the law.

The concern of the Bar arises, not from the facts or the outcome of the particular case, but from the basic question of administrative law and the withholding of judicial review. The opinion of the dissenting Justices summed up the issue as follows:

> The reversal of the position of this Court is due to a fundamental change in prevailing philosophy. The basic assumption of the earlier opinion as therein stated was, *"But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards."* *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 92-93. The basic assumption of the present opinion is stated thus: *"The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it."* (Par. 13.) This puts in juxtaposition the two conflicting philosophies which produce opposite results in the same case and on the same facts. The difference between the first and the latest decision of the Court is thus simply the difference between holding that administrative orders must have a basis in law and a holding that absence of a legal basis is no ground on which courts may annul them.
>
> As there admittedly is no law or regulation to support this order we peruse the Court's opinion diligently to find on what grounds it is now held that the Court of Appeals, on pain of being reversed for error, was required to stamp this order with its approval. We find but one. That is the principle of judicial deference to administrative experience. That argument is five times stressed in as many different contexts, . . .

The dissenting opinion next challenged squarely the denial of judicial review because of the supposed "experience" of the SEC with the subject-matter of its order:

> What are we to make of this reiterated deference to "administrative experience" when in another context the Court says, "Hence, we refuse to say that the Commission, *which had not previously been confronted with the problem of management trading during reorganization,* was forbidden from utilizing this particular proceeding for announcing and applying *a new standard of conduct*"? (Par. 17.) (Emphasis supplied.)
>
> The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted!
>
> Of course, thus to uphold the Commission by professing to find that it has enunciated a "new standard of conduct," brings the Court squarely against the invalidity of retroactive law-making. But the Court does not falter. "That such action might have a retroactive effect was not necessarily fatal to its validity." (Par. 17.) "But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles." (Par. 17.)

Mr. Justice Jackson then resorted to an unimpressive informality by saying:

> I give up. Now I realize fully what Mark Twain meant when he said, "The more you explain it, the more I don't understand it."

Passing to the broader question of judicial "abdication" to putative "administrative experience" even where non-existent, the dissenting opinion says:

> If it is of no consequence that no rule of law be existent to support an administrative order, and the Court of Appeals is obliged to defer to administrative experience and to sustain a Commission's power merely because it has been asserted and exercised, of what use is it to print a record or briefs in the case, or to hear argument? Administrative experience always is present, at least to the degree that it is here, and would always dictate a like deference by this Court to an assertion of administrative power. Must the reviewing court, as this Court does in this opinion, support the order on a presumptive or imputed experience even though the Court is obliged to discredit such experience in the very same opinion? Is fictitious experience to be conclusive in matters of law and particularly in the interpretation of statutes, as the Court's opinion now intimates, or just in fact finding which has been the function which the Court has heretofore sustained upon the argument of administrative experience?
>
> I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. . . .
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> * * * * *
>
> The truth is that in this decision the Court approves the Commission's assertion of power to govern the matter *without* law, power to force surrender of stock so purchased whenever it will, and power also to overlook such acquisitions if it so chooses. The reasons which will lead it to take one course as against the other remain locked in its own breast, and it has not and apparently does not intend to commit them to any rule or regulation. This administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words. . . .

In concluding, Mr. Justice Jackson summed up the issue as follows:

> The Court's averment concerning this order that "It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process," (Par. 29) is the first instance in which the administrative process is sustained by reliance on that disregard of law which enemies of the process have always alleged to be its principal evil. It is the first encouragement this Court has given to conscious lawlessness

as a permissible rule of administrative action. This decision is an ominious one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority.[1]

I have long urged, and still believe, that the administrative process deserves fostering in our system as an expeditious and nontechnical method of *applying law* in specialized fields.[2] I cannot agree that it be used, and I think its continued effectiveness is endangered when it is used, as a method of *dispensing with law* in those fields.

A far-reaching question of administrative law and of the statutory assurance of judicial protection for persons aggrieved by lawless acts of agencies has thus been made crystal-clear. In connection with it, the articles by Dean Roscoe Pound and by Chief Justice McRuer, elsewhere in this issue, will be found to be timely and pertinent.

1. On the same day the Court denied its own authority to recognize and enforce without Congressional action, an unlegislated liability much less novel than the one imposed here, and that in the field of tort law which traditionally has developed by decisional rather than by legislative process. The result is to confirm in an executive agency a discretion to act outside of established law that goes beyond any judicial discretion as well as beyond any legislative delegation. Compare *United States* v. *Standard Oil Co.*, June 23, 1947.

2. See statement before House of Delegates, American Bar Association, 1939. (1939 Proceedings, House of Delegates, 25 A.B.A.J. 95; February, 1939). Also see Report as Attorney General to President Roosevelt recommending veto of Walter-Logan Bill—made part of veto message, Vol. 86, Part 12, *Congressional Record*, 76th Congress, 3d Session, page 13943.

Editor's Note: The text of these two footnotes is taken from Mr. Justice Jackson's opinion, in which they appear although differently numbered.

■ *"Any Legal Question Is at the Same Time a Political Question"?*

It was in the conference room at Lake Success, where Committee No. 6 (Legal) of the General Assembly was in amiable session. Two resolutions were under consideration; their common objective was to take international legal disputes to a greater extent out of the acrimonious debates at the political level and into the atmosphere of an impartial, impersonal, law-governed Court—the International Court of Justice. Sir Hartley Shawcross, Attorney General of Britain, honor guest at our Association's meeting at Atlantic City last year, had told the Committee the day before that many of the failures of the United Nations had been due to a "political" approach to its problems rather than a submission of them to standards and processes of "law".

Dr. Herbert V. Evatt, burly lawyer and former judge in Australia, had proposed that the various organs of the United Nations compile and state their legal problems as encountered in their sessions and submit them at least once a year to the World Court for "advisory opinions" (Statute of the Court, Article 65). In so doing, he emphasized that the Court could handle only international legal disputes, not political controversies. The Iranian delegate's proposal called on all member Nations to agree to and accept the compulsory jurisdiction of the Court "as soon as possible" and to submit to the Court all their juridical differences. The proposal asked the Security Council to do likewise—which would "by-pass" the "veto".

Nearly all of the speakers in the fifty-seven-member Legal Committee supported the proposals. Colombia offered the drastic suggestion that all disputes of every kind should go to the Court, but said the idea was "only a hope of a wish".

Then Dr. Vsevolod N. Dudrenevsky of Russia attacked all of the proposals. The Soviet Union has not accepted the Court's jurisdiction, although it has a judge on the Court. He said that only nine Nations had accepted the Court's jurisdiction, and objected to the Iranian proposal as an effort to set up a "deadline". Georges Kalckenbeck, of Holland, Rapporteur for the Committee, pointed out that in addition to the nine states, there were those who had bound themselves to the Court's jurisdiction before the San Francisco Conference as well as states in whose parliaments the acceptance of obligatory jurisdiction was pending. He placed at twenty-eight the number of states presently bound.

Dr. Dudrenevsky assailed the Australian proposal on the ground that it would be contrary to the Charter itself for the Court to interpret the Charter. He declared that Article 96 of the Charter, which authorizes certain organs of the United Nations to ask the Court for an "advisory" opinion on "any legal question", in effect limits the questions which may be so referred and who may refer them. He foresaw that the Court might be swamped with requests for advisory rulings and that a mass of "useless" opinions would be accumulated. He drew a horrendous analogy to the Supreme Court of the United States, whose rulings had in recent years, he said, covered American law "with thick layers of legal opinions". He denounced the proposals to refer legal disputes to the Court as an attempt to circumvent and by-pass the Security Council. In the Court, a majority vote of judges would decide disputes; no one nation would have a "veto".

Then he launched into more fundamental philosophy of the Soviet Union as to law under Communist concepts. A delegate of the Soviet Union had stated fluently, months ago, in the United Nations, the Communist view that "facts are a political matter" (33 A.B.A.J. 696; July, 1947). This time Dr. Dudrenevsky dealt with law. "Any legal question is at the same time a political question," he declared, without qualification. "If we do not solve the political question, we do not achieve much."

Like an old melody that has been changed in time and rhythm, his preachment was hauntingly reminiscent of what we have at times heard and read in our own country, emanating from high places: Facts and fact-finding are "a political matter", to be determined by politically-minded agencies. "*Any* legal question is at the same time a political question" and the tribunal to decide the legal question should heed the political and policy angles. At any rate, the discussion confirmed again the folly of those who thought that the fate of men and Nations for generations to come could best be decided by casual conferences of the heads of the principal

states which had been on the same side in World War II and that the United Nations should be left powerless to seek and work out even the pacific settlement of provocative disputes unless these heads of states agreed that this should be done.

Against the Soviet delegate's concept that "any legal question is at the same time a political question" and that the political and policy angles must enter into its determination, we place the philosophy of the law-abiding Nations, so trenchantly stated by Chief Justice McRuer of Canada, elsewhere in this issue. As to juridical philosophies against which we of America need to arouse ourselves and be on guard, we cite the forceful analyses by Roscoe Pound, also published in this issue. In the United Nations, our own country shares with Britain and others the responsibility for keeping legal disputes in the forums of sounding-board discussions at "the political level" while the World Court waits for cases.

■ *JOURNAL Articles Receive Attention at Lake Success*

In the 57-member Political Committee of the General Assembly of the United Nations at Lake Success on October 16, Kuzma V. Kiselev, Foreign Minister of White Russia, which is a member of the Soviet Union, attacked the article in the JOURNAL for August (page 756): "If 'Two Worlds': What Can United Nations Do for Majority Action?" As reported in the New York *Times* for October 17, he said, after criticizing Senator Vandenberg and Hamilton Fish Armstrong, Editor of *Foreign Affairs* and an adviser to the United States Delegation in San Francisco:

> Mr. Kiselev went on to accuse some United States leaders of trying to liquidate the United Nations and form a new one without the Soviet Union. Besides Mr. Vandenberg and Mr. Armstrong, Mr. Kiselev mentioned John Foster Dulles of the United States Delegation and Thomas Raeburn White and William L. Ransom, attorneys who supported elimination of the veto in an article written for the August issue of the AMERICAN BAR ASSOCIATION JOURNAL.

Members of our Association will be pleased by this further evidence that delegates of the Soviet Union read the JOURNAL. Mr. Kiselev could with an equal lack of justification have criticized the unanimous report of our Association Committee and the unanimous action of the House of Delegates on September 24, but presumably they will not come to his attention until he receives this issue of the JOURNAL, which contains the report of them.

His attack may lead our readers to re-examine the articles to which he referred, as well as to read the action of the House of Delegates. If the point of view stated on page 759 of our August issue, as quoted in the New York *Times* for October 6, is an advocacy of "elimination of the veto" or of "liquidation of the United Nations", its author failed to convey his meaning. The article did offer a constructive suggestion, for consideration and possible use in emergency. So did Resolution No. 4, adopted unanimously by the House of Delegates. The House Resolutions urged support and strengthening of the United Nations; they speak for themselves.

Coincidence and contrast, in view of the attack of the spokesman for the Soviet Union, are in the fact that the *World Government News*, published by the advocates of "world government", also attacked the Association (the House of Delegates) and the JOURNAL in October, but for supporting so staunchly the United Nations.

Editorial — **From a Member of Our ADVISORY BOARD**

■ *The Law—Available to All—Respected by All*

During our Annual Meeting in Cleveland, the chief judicial officers of Great Britain, of Ontario, Canada, and of the United States, all emphasized one all-important consideration. In view of the present challenge from abroad to the Anglo-American tradition of government not of men but of law, the Chief Justice of the United States, the Lord Chancellor of Great Britain, and the Chief Justice of Ontario, lately president of the Canadian Bar Association, said that if the challenge is to be met, the impartial and fearless processes of the law must be made available to all and must be habitually accepted by all, as the embodiment of justice, security and opportunity. President Rix's keynote address was to the same effect.

In other words, if our legal system should become mostly a shield for vested interests, political opportunists, in the guise and garb of judges, or imperialists, it would be vulnerable to the attacks of its foes. Those who defend our system of government and jurisprudence have said and are justified in saying that there is greater freedom, both political and economic, under our system than under any other. But of course if this is to remain true, the protective processes of the law dare not be left beyond the reach of anyone who has need for justice and fair play.

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Such statements were given unanimous assent, by judges and lawyers present. Apparently there was no one who questioned either the soundness of the principle announced or the urgent need for such an admonition now. Nor is it the purpose of this editorial to question or qualify the pronouncements of those three learned jurists. It is my purpose, however, to call attention to another danger which must be given equal consideration if our form of government is to be kept in balance. The attack upon our system is not only from abroad; it is also from within. We are being challenged, not only by open opposition, but by infiltration and revolution. The secret agents of opposing systems strive in every way possible to bring about a disintegration and demoralization of our social and legal order.

The danger does not arise from what those agents may themselves do, but it does arise from the trends of thought and emotionalism which have a great tendency to spring up and grow strong in government by the people, even under a constitutional republic.

This tendency was feared by the men who drafted the United States Constitution. Madison referred to it as "the popular vortex". The men who drafted that instrument were profound political scholars, familiar with the history of all forms of government. They knew that republics and democracies of the past had degenerated into ochlocracies and that blind majorities, even mob violence, had supplanted the rule of law. The founders sought to establish a saving balance between the opposing forces of society. They provided that the government itself, all its officers and agents, should be subject to law, as well as to laws, and they invested independent Courts with power to restrain the abuse of authority by anyone acting for government. But it was their definite and expressed intention to establish a strong government with ample authority to repress violence and protect the community interest. They established a government, a government of law, a government which recognizes that all men are equal before the law. But the very nature of that government as the lawful source of all our liberties requires a respect for law and a rigorous maintenance of law.

The forces which challenge our way of life do so because they openly espouse "the dictatorship of the proletariat", and they know that our system of law opposes dictatorship or arbitrary power, in the hands of anyone or any class. Our system affords the greatest possible opportunity for a classless society. But the danger is that when the ferment of class consciousness sets in, it will disrupt the lawful foundations of social order. People are prompted by vague emotions to take sides; then in their zeal as champions of one side or the other, they unwittingly destroy the balance and the authority which is the protection of all.

We see alarming signs of disrespect for law and disregard of the community interest. Selfishness and factionalism are asserted against the commonweal. Subversive agents strive to create arrogance in the common man and to induce him to abandon his only source of security and human dignity—the law. As Professor Hugh Last of Brasenose College, Oxford, has said: "There are tendencies about which bode trouble—not because the people who show them are evil but because they do not understand the fundamental facts of their own civilization".

The members of our profession have been instructed in the foundations of our way of life. They do know the necessity for maintenance of order and respect for law and lawful authority. They know that discipline is as essential to the welfare of society as it is to the welfare of the individual. It is therefore incumbent upon all of us to keep the people reminded that while efforts are being made by our Association and our profession to insure the availability of the law to every man, every man must in turn give to the law the utmost of his respect and devotion.

ROBERT N. WILKIN

Cleveland, Ohio

Editor to Readers

■ We welcome a new regular contributor to our columns. President Tappan Gregory will write "The President's Page". This will enable him to give a message each month to all members of our Association, instead of only to those who are in meetings which he addresses. In inaugurating this desirable feature, he gives news and views which should have the thought and the active cooperation of all our readers.

* * * * *

This issue is devoted considerably to further addresses and proceedings from the 1947 Annual Meeting in Cleveland, the publication of which was begun in our October number. This time we have a "high-light" commentary on the convocation; also, a page of striking sentences and short paragraphs culled from a few of the many speeches. The stirring address by the Lord Chancellor of Great Britain is being checked from the stenographic transcript, and will be published next month. Proceedings of the Assembly and House of Delegates will be reported in detail, as soon as the stenographic transcript and documents can be summarized. Other addresses and papers will be published, in full or in summary, as our limited space permits.

* * * * *

On September 23 the Advisory Board of the JOURNAL met at luncheon in Cleveland, with United States District Judge Robert N. Wilkin as host. He acted also

as informal and unofficial chairman of the gathering, and spoke briefly, along lines which made a deep impression. At the request of several and the invitation of the JOURNAL, he later wrote out for us, with some amplification, what he said to our Advisory Board. It is published on this page as the editorial contributed from our Advisory Board.

* * * * *

One never knows when some article in the JOURNAL will show up somewhere in the world as a factor in the struggle for peace and law or other objectives of our Association. Last January we published Judge Robert N. Wilkin's "World Order: Law and Justice or Power and Force?" (33 A.B.A.J. 18). Recently there came to your Editor's desk a copy of a daily newspaper published in Athens in embattled Greece. The issue of *Elefteria* ("Liberty") for July 20 contained a translation into the Greek of nearly all of Judge Wilkin's article. Although delayed in publication by the shortage of paper, the August issue of the Athenian monthly legal review *Neon Dikaion* ("New Law") contained the same translation. Credit in each instance was given to the JOURNAL for this material which has been utilized as ammunition in the battle against totalitarianism. To many of our readers, in their unmolested offices and comfortable homes, the earnest plea in Judge Wilkin's contribution doubtless seemed quite general and lacking in specific application to life here; but to lawyer-patriots in Greece there was nothing abstract about it —the issue is between liberty and life or totalitarianism and death.

Word has come also that Sotirios Gravanis, a lawyer of Athens, has translated into the Greek and will soon publish despite the obstacles, Judge Wilkin's *The Spirit of the Legal Profession*. Wherever liberty and law are cherished, and are nurtured by lawyers who are on the firing-line for free Courts and democratic government, the publications of our Association are scoured for material which can be republished in defense of the world-wide objectives of independent lawyers.

* * * * *

In order to maintain and improve your JOURNAL according to the standards we have set for it, we need a substantial increase in our revenues from advertising. Increased costs of printing and paper impose this necessity and make it urgent. Many of our readers who believe in what the JOURNAL is trying to help do for our country and our profession can obtain advertising for us if they will say the right word to clients. In comparison with national magazines which have a circulation of millions of copies, the JOURNAL makes no strong appeal as a medium, to the advertising agencies. Yet the 41,000 lawyers who read the JOURNAL each month are a potential sales constituency of unusual worth, for many services and products. Since we cannot go to national advertisers through the agencies, we ask our readers if they will advance our Association's objectives by helping us. A few pages more of advertising each month will make a lot of difference in what we can do.

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More than a year ago the Law Institute of Australia asked for and was given permission to reprint from the JOURNAL in its publication Reginald Heber Smith's articles on law office organization. About that time, the Parliament of Victoria enacted a law for a compulsory annual audit of solicitors' accounts. Burdensome regulations were administratively issued thereunder. These made necessary substantial changes in law office organization and accounting. For this purpose, Mr. Smith's practical articles, as published in the JOURNAL of the Institute, are reported by its President to have been most timely and useful to members of the Australian Bar. "Many of my partners have been extremely interested in the number of partners in American law firms," also writes President R. N. Vroland. "There is nothing in Australia to compare with this in size. The larger firms which would employ between 100 and 150 persons in some instances have no more than three partners, and in the case of the largest firm in Melbourne there are eight or nine partners—the majority of whom would be on a salary only."

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During the Cleveland meeting several lawyers said to your Editor-in-Chief that they had been substantially aided in pending cases by the articles in the September JOURNAL (page 857) on the Federal Tort Claims Act and on the extent and nature of the care required of an air carrier of persons or property (page 900). They said they have found material "right on our point," which they expected to cite and quote to Courts. Letters received from readers have been to like effect. Possibly any of our members who did not examine those articles with care at the time of their publication will advantageously turn back to them, to see if they, too, find them of practical help.

* * * * *

Members of our Association in the Continental United States sometimes think that they experience adversities and hardships—more than a few of them do. From the faraway Philippines comes a letter from Francisco Ortigas, Jr., member of our Association before the Japanese invasion. He and his family suffered privations and perils, during three years of Japanese occupation, but survived. During the battle for the liberation of Manila, his law library and all his effects and papers were destroyed, including his prized membership card in our Association. Now he is back in the active practice of law and is again in good standing in our Association. He sends your Editors a reprint of an article which he contributed to the *Commercial and Financial Chronicle* on the "Aftermath of Japanese

Currency in the Philippines", the notorious "Mickey Mouse" currency that rivaled Walt Disney creations and was used by the invaders to force the liquidation of foreign banks and holdings. His views as to the validation or redemption of this currency disagree with those expressed by former High Commissioner Paul V. McNutt, member of our Association since 1920.

* * * * *

Important for the policies and future of the JOURNAL was the Cleveland meeting of members of its Advisory Board, as Judge Wilkin's guests at luncheon. More than half of its members were present; several had come to Cleveland for the particular purpose. It was a most representative group—the Law School Deans from Harvard, Yale and Illinois; a United States Senator; several leaders in the Junior Bar Conference; the Chief Justice of a State Supreme Court; two federal judges; several teachers of law; a college president; practicing lawyers from all parts of the country—probably as able and representative a group, if you will look at the list on page 1119, as has yet been convened under the auspices of the organized Bar. This was the first time the Advisory Board, created during the past year, had met with the Board of Editors and the full-time staff. Searching questions were asked; many problems confronting the Board of Editors were submitted for the opinion of the Advisory Board; policies of the JOURNAL were frankly discussed.

One of the interesting angles on which a strong consensus was manifest was that all members of the Association in their home communities ought to do what they can to have the JOURNAL read by non-members and non-lawyers. It was urged that each member should see to it that the JOURNAL is received by every

(Continued on page 1158)

Notice by the Board of Elections

▪ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1948 Annual Meeting and ending at the adjournment of the Annual Meeting in 1951:

ARIZONA	NEBRASKA
DIST. OF COLUMBIA	NEW JERSEY
CONNECTICUT	OKLAHOMA
ILLINOIS	PUERTO RICO
IOWA	SOUTH CAROLINA
MAINE	SOUTH DAKOTA
MICHIGAN	TEXAS
MISSISSIPPI	WASHINGTON
MONTANA	WYOMING

Election will be held in the State of

ARIZONA and in the

DISTRICT OF COLUMBIA

for State Delegates to fill the vacancy in the term expiring at the adjournment of the 1948 Annual Meeting.

Election will be held in the State of

NEW YORK

for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1949 Annual Meeting.

State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Nominating petitions for all State Delegates to be elected in 1948 must be filed with the Board of Elections not later than April 9, 1948. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 10) cannot be published prior to distribution of ballots, fixed by the Board of Elections on April 20, 1948.

Forms of nominating petitions for the three-year term, and separate forms of nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. *Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 9, 1948.*

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the States in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild
Chairman
William P. MacCracken, Jr.
Harold L. Reeve

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"Books for Lawyers"

PATRICK HENRY: THE VOICE OF FREEDOM. *By Jacob Axelrad. New York: Random House. September, 1947. $3.75. Pages 318.*

On the dust jacket the publisher quotes Allan Nevins that this is "the best biography of Henry yet written, and a fine example of popular yet scholarly history." No doubt Professor Nevins' purpose was to be as complimentary as possible without sacrificing accuracy. Equally significant, however, is what is left unsaid. It is easy enough to characterize Mr. Axelrad's work as "the best biography of Henry yet written", for no other even approaches adequacy. Indeed, Mr. Axelrad writes that he undertook his task because "too many know too little about" Henry. Nor is it inaccurate to say that while this is a "popular" biography it is "scholarly".

This, however, is not to say that Professor Axelrad has written a definitive study of Henry. Brevity, such as that of Mr. Axelrad, is an asset in a popular biography but does not permit full exploration of the subject. Moreover, it is doubtful whether we shall ever have a definitive biography of Henry. He is not only one of the most baffling personages of his period but, in contrast with most of his contemporaries, he left almost no written memorials of his activities or thoughts. Furthermore, some of the most puzzling questions about him are posed, not by what he did and which was recorded, but by what he failed or refused to do and which he never explained.

This is not in depreciation of Mr. Axelrad's work; he has, indeed, written a readable and significant book. It places Henry in true proportion against the background of his times. The fact and especially the legend of Henry's oratory have not only overshadowed but to a large extent blacked out his other achievements and characteristics. Unquestionably he was superlatively great as an orator—probably the greatest we have produced, if the test of an orator is his ability to cause his hearers to share with him a major emotional experience. Byron was not far wrong in calling Henry "the forest-born Demosthenes". Mr. Axelrad's subtitle is "The Voice of Freedom". Henry was all that but, as is abundantly demonstrated, it is not a case of *vox, et praeterea nihil,* for there was to Henry's career much more than mere oratory. He was far from a "single-speech Hamilton".

Henry was an effective and successful lawyer and, although not a great part of his active life was devoted to the practice, acquired a modest fortune from his fees, after he had failed at a number of other vocations. Not only did Henry's natural oratorical talent admirably equip him for advocacy, but he displayed a grasp of legal principles which deeply impressed all who heard him. He first acquired a reputation in the *Parson's case,* which involved the constitutional question of the power of the British Crown to set aside an Act of the Virginia House of Burgesses. After the Revolution, as co-counsel with John Marshall, he defended Virginia debtors in suits brought by English creditors, and exhibited a profound knowledge of international law.

The striking fact about Henry as a lawyer is that he was entirely self-educated. Not only did he, like others of his time, lack any formal training but, unlike most of them, he never read law under, or had the benefit of an association with, an older lawyer. When he sought admission to the Bar he showed so little knowledge of law that the examiners, notwithstanding the lax standards of the time, almost rejected his application. They relented only because of his power of argument and his promise diligently to study—a promise he faithfully kept.

Mr. Axelrad's account of Henry's career at the Bar is not only to a lawyer the most interesting part of his book, but is in all respects the most valuable. Little new light is thrown upon the other facets of Henry's life, although the story is accurate and entertaining. It is well enough that it should be retold, for Henry's reputation has suffered the fate of those who have gone down with lost causes. In Virginia and as a member of the Continental Congress he did as much as any other American to inspire and plan for resistance and especially to build up a demand for complete separation. It is for these efforts that he is remembered.

At the beginning of the Revolution he was given command of the Virginia troops but, having lost the confidence of the civil authorities, resigned without seeing service. Later during the conflict he served without distinction as governor.

After Yorktown and until almost the end of his life, Henry's career was one of futile opposition. His objective had been twofold: Armed rebellion against and separation from Britain and a peaceful revolution at home which would give the underprivileged a greater share in the government. But the men who fought the war, made the peace and were in control of the formation of the new government, while they had slowly become convinced that war and separation were necessary, would have no traffic with the idea of revolution at home. To Henry they seemed bent upon exchanging for-

eign for domestic tyranny; so he refused to become a member of the Constitutional Convention and bitterly opposed ratification. He was one of the most effective proponents of the first ten Amendments, but to him their adoption was merely a mitigation of the evil.

Henry served five terms as governor of Virginia, and repeatedly as a member of the State Assembly. However, he consistently refused to accept office under the federal government. He declined to serve either as Senator or Secretary of State, and refused an appointment as Chief Justice of the United States. Moreover, he unsuccessfully attempted to prevent Madison's election to Congress because he was displeased with the part Madison had played in the Constitutional Convention.

In all this Henry was a man without a party. While he bitterly opposed the Federalists he was far from a Jeffersonian. He had supported the resolution offered in the Virginia Assembly to investigate Jefferson's conduct as governor and the result was a feud between the two men that Jefferson carried on even after Henry's death.

Washington was one of the few persons who retained Henry's confidence. While he frequently disagreed with Washington, Henry's respect and admiration for the man never wavered. It was probably because of Washington's influence that Henry's life in his last years took a curious turn that has not yet been fully explained. Toward the end Henry aligned himself with the Federalists. He was responsible for John Marshall's election to Congress, vigorously supported Washington in the Genet affair, and strongly opposed the Virginia-Kentucky Resolutions. Finally, at Washington's request, he became a Federalist candidate for the Virginia Assembly. This was the last office to which he was elected, for he died before his term began.

As to these contradictory phases of Henry's career Mr. Axelrad arouses but does not satisfy our curiosity. Perhaps any attempt to do so would have been pure speculation, for the sources, which Mr. Axelrad seems fully to have examined, probably disclose nothing of Henry's motivations and little of the influences that swayed him.

WALTER P. ARMSTRONG
Memphis, Tennessee

AVIATION ACCIDENT LAW—*By Charles S. Rhyne. Washington, D. C.: The Columbia Law Book Company. $7.50. Pages x, 315.*

This is a complete collection of reported court decisions involving aviation accidents, together with a reference to all legislation and all international conventions relating to aviation tort liability. The volume thus covers a new field of law which is fast becoming of primary importance to many lawyers.

The author has long been active in the American Bar Association as National Chairman of the Junior Bar Conference, as Secretary and Vice-Chairman of the Section of International Law, as a member (now State Delegate) of the House of Delegates, and now as Chairman of the Aeronautical Law Committee. This is Mr. Rhyne's third major work in this specialized field, his *Airports and the Courts* and *Civil Aeronautics Act Annotated* gained wide usage among lawyers. His latest volume is of more widespread interest than his first two books, for almost any lawyer can anticipate some problem growing out of an aviation accident. Lawyers will find this work a most useful starting point.

As there are few more spectacular sources of litigation than the airplane accident, this volume will be excellent reading for those who are interested in airplanes and air travel. For the lawyer there are more compelling reasons for a thorough study of it. Few who reflect upon the position now occupied by the airplane in our national life, compared with the position it occupied twenty years ago, can fail to appreciate this example of amazing progress. Within a few years we have come from the days of the "Lone Eagle" to the era of the super-airliner carrying up to three-score persons across the oceans —from the days of the cow-pasture landing-field to the day of the giant airport receiving and dispatching literally hundreds of airplanes daily. The "Air Age" is indeed here, and people are air-minded as never before. It was inevitable that the development of a mode of travel involving such an instrument as the airplane would create new problems of rights and duties, and of liabilities, for the consideration of the Courts. And as more and more persons participate in air travel, whether by means of the small private airplane or the commercial airlines, and as more goods are shipped by air, litigation arising from such activity will increasingly occupy the attention of the Courts.

Mr. Rhyne has produced for the assistance of the lawyers engaged in aviation accident litigation an analysis of all reported decisions affecting the liabilities of aircraft operators resulting from aviation accidents. The pattern of Court decisions from the days of the primitive balloon to the present is traced in detail, with emphasis on each of various questions which have arisen and will continue to arise in this field. Every case is thoroughly documented with citations of similar decisions. Since many of the cases in this new field of law are decisions of Courts of the first instance, the only citations which are usually available are to specialized aviation law reports, this book is all the more valuable to the general practitioner who does not have the specialized reports and does not want to spend several hundred dollars to purchase them. Thus in capsule fashion material scattered throughout many sources is condensed into one volume. An example of the questions arising in this field is found in the author's presentation of the problem of the proof of the causes of aviation accidents. The problem is presented as follows:

> In many instances it is very difficult to determine the exact cause of airplane accidents. It often happens that

there are no living witnesses to describe exactly what happened at the time of the crash. Scattered wreckage at the scene of the crash may offer investigating bodies little or no information as to the true cause of the accident so that their conclusions are often conjectural. The very nature of the airplane is such that after every accident there is speculation as to whether or not the accident was caused by an error in the pilot's judgment, by unforeseen and momentary weather conditions, by unknown and undiscoverable structural defects in the plane or by one of several other possibilities.

Thereafter Mr. Rhyne has set forth and analyzed the known cases involving the question of the cause of aircraft accidents, together with a discussion and evaluation of the doctrine of *res ipsa loquitur* with respect to the manner in which this common law concept has been applied to accidents arising out of air travel.

Those who are faced with the problem of insurance in aircraft accidents will find the chapter dealing with this subject a "must." Every decision which has dealt with such problems seems to have been given the author's attention. As in other parts of the book, liberal use is made of pertinent language of the decisions to illustrate clearly the varying positions taken by Courts on such questions as aviation exclusion clauses in insurance policies. The unusual legal problems involving workmen's compensation for aviation employees are considered in another chapter of special interest to insurance lawyers.

The tremendous increase to be expected in international air transportation leads one to conclude that problems of conflicts of laws will be given a great deal of consideration in the future. As Senator Pat McCarran of Nevada says in his foreword to this volume: "Our tort liability laws cannot follow our air carriers into foreign nations and almost every nation has not only different laws but different types of remedies from those prevailing in our country." As the Senator further points out, much uniformity has been produced in those countries where the Warsaw Convention of 1929 has been adopted. Mr. Rhyne has given full attention to the questions involving this Convention in its application to accidents occurring in international air travel, and also considers the cases which so far have arisen under it. Many lawyers will be surprised to learn that usually when a person is injured in international air travel his recoverable damages are limited by the Warsaw Convention to a total of $8,291.87. This is only one of the many unusual features of aviation tort liabilities which are covered in *Aviation Accident Law*.

While accidents which have involved the larger commercial aircraft have perhaps created the greater public interest, those involving private aircraft may not be overlooked in view of the importance that litigation arising from such accidents now has in the field of aviation accident liability. Various estimates have been made as to the number of private aircraft which will be in operation in this country within the next few years. All estimates are substantial. The recently established national aerial "road" extending from coast to coast is indicative of what is to be expected in the near future in the volume of private aircraft traffic throughout the nation. As with other forms of private transportation, accidents and litigation arising from it are certain to increase as more and more of such aircraft take to the air. Mr. Rhyne has not overlooked these aspects, and has included in his new volume a discussion and analysis of the reported decisions determining the liabilities of private aircraft owners and operators.

Nearly every lawyer is, or soon will have to be, interested in problems of aviation accident liability. This timely book seems to be the most authoritative and useful source of practical assistance.

WALTER M. BASTIAN

Washington, D. C.

REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND". *By Charles E. Clark. (Second Edition), Chicago: Callaghan and Co. 1947. $6.00. Pages LV, 281.*

Judge Clark's excellent essays, written originally for law reviews, were assembled by him and published as a book under the above title in 1928. Most second editions are brought out to alter conclusions of the author which have been materially affected by later Court decisions and to analyse those later decisions and bring annotations down to date.

This second edition seems to have been prepared primarily to reestablish the soundness of Judge Clark's conclusions upon the law of the subject as expressed in his first volume, notwithstanding the American Law Institute's declarations as to the law of the subject matter in the fifth volume of its *Restatement of Property*, which appeared in 1944. Both in principle and in detail the Restatement is largely in conflict with Judge Clark's views.

Judge Clark's second edition, like his first edition, discusses first, licenses in real property law, and secondly, the running of easements and profits, and thereafter devotes the bulk of the volume to the history and development of the running of covenants, followed by a chapter on rents and a final short chapter on statutory changes. It also includes as appendices articles setting forth his controversy with the Reporter of the Institute as to the correctness of the positions taken in the *Restatement*.

The chapter on "Licenses in Real Property Law" has not been changed materially, nor has the chapter on "The Running of Easements and Profits," except in each chapter to point out the contrary positions taken by the *Restatement* and to criticize their correctness.

But the chapter on "The Running of Real Covenants," after setting out unchanged, except for new

citations, the author's views of the nature of a covenant which can run with land, its history, and the reason for its running to assigns as to both benefits and burdens, proceeds to attack the contrary theories of the *Restatement*. It attacks the *Restatement's* requirement of privity between promissor and promissee, its restriction of the remedy of damages for breach by an assignee, its emphasis on the relative reasonableness of burden to benefit, and the resultant uncertainty as to the effectiveness of particular covenants until their validity has been determined by litigation.

The Courts have added very little to the law of "covenants which run with land" since 1928, the date of Judge Clark's first edition. The most important State decision is probably *Neponsit Property Owners' Association* v. *Emigrant Industrial Savings Bank*, decided in 1938,[1] which appears to line up New York with the States allowing the burden of covenants to run with land as common law rights, and Judge Clark's own decision in *165 Broadway Building* v. *City Investing Company*, rendered in 1941,[2] which, though a federal Court decision, does much to clarify the law of covenants generally.

In the last thirty years, the formerly more or less confused American law of real covenants has simmered down until now a majority of the States allow both the burdens and benefits of covenants to run to assigns without distinction between law and equity; five allow restrictive covenants to run in equity, but have not decided whether or not they run at law; and two, New Jersey and Virginia, allow them to run in equity only.[3] Therefore when the American Law Institute's restatement of the subject appeared with a different classification of the principles and a different declaration of the law, although of course without quoting or discussing the cases, it became imperative on Judge Clark to bring out a second edition, reiterating and defending his views.

His Chapter IV, on the running of benefits and burdens of covenants, practically unchanged from the first edition, and his unchanged text of Chapter V, on party-wall agreements, are classics; and as most other students of the subject were substantially in accord with him except as to the historical origin of running covenants, whether they develop from the use of the ancient writ *de fino facto*, or from the feudal implied warranty, as argued by Oliver Wendell Holmes and others, they will welcome this second edition, especially as the first edition is now out of print.

The republication of Judge Clark's sixth chapter unchanged except for additional citations, that on "The Running of Equitable Restrictions," is unfortunate. The recognition of "Equitable Restrictions" originated in a decision by Lord Cottenham in 1848, when the history of the running of the common law covenants had not been traced. In an effort to do rough justice to an owner of the land benefited by a restrictive covenant, the Court held that the assignee of the burden could be held in equity to an agreement to which he could not be held at law,[4]—a palpable absurdity, as Lord Eldon had already pointed out.[5] Nevertheless it is still law in England, and has been frequently recognized in America by Courts which also allow liability in damages at law. As stated above, New Jersey and Virginia seem to be the only States which have followed Lord Cottenham *in toto*. But the *Restatement* adopted the theory; and Judge Clark's new edition does not meet that issue at all; although his unchanged Chapter VI, when written in 1928, merely stated the theory of equitable easements without anaylsis or criticism.

HENRY UPSON SIMS
Birmingham, Alabama

1. 278 N. Y. 248; 15 N. E. 2nd 793.
2. 120 F. 2nd 813.
3. See "The Law of Real Covenants", etc., in 30 Cornell Law Quarterly, No. 1; page 27.
4. *Tulk* v. *Moxhay*, 2 Phil. 774; 41 Eng. Repr. 1143.
5. *Duke of Bedford* v. *Trustees of Brit. Mus.*, 2 M & K, 552; 39 Eng. Repr. 1060.

CHARTER OF THE UNITED NATIONS, STATUTE AND RULES OF COURT AND OTHER CONSTITUTIONAL DOCUMENTS.

International Court of Justice, Series D (Acts and Documents Concerning the Organization of the Court), No. 1. (Second Edition). May, 1947. Leyden, Holland: A. W. Sijthoff's Publishing Company. Distributed by International Documents Service, Columbia University Press, New York. $1.50. Pages 142.

This handy volume, prepared by the Registry of the International Court of Justice, contains the French and English texts of the basic documents relating to the functioning and the administration of the Court.

In particular, it includes, besides the texts of the Charter of the United Nations and the Statute of the Court, the following: The new Rules of the Court of May 6, 1946; the far-reaching Resolution of the General Assembly of December 11, 1946, on the privileges and immunities of members of the Court, the Registrar, officials of the Registry, assessors, the agents and counsel of the parties and of witnesses and experts; the exchange of letters of June 26, 1946, on the privileges and immunities of the Court between the President of the Court and the Minister of Foreign Affairs of the Netherlands; the liberal pension plan for members of the Court and the strict travel and subsistence regulations, which were adopted by the General Assembly on December 11, 1946; the much-criticized Resolution of the Security Council of October 15, 1946, on the conditions under which the Court shall be open to States not parties to the Statute of the Court; and the recommendation of the Security Council to the General Assembly, of November 15, 1946, concerning the conditions on which Switzerland may become a party to the Statute of the Court. The final Resolution of the General Assembly on Swiss participation—of December 11, 1946—is missing from the volume. The Resolution of the General As-

sembly, of February 6, 1946, on the emoluments of the judges is not reproduced here either, though it was ordinarily included among the documents in a similar volume issued from time to time by this Court's predecessor, the Permanent Court of International Justice. Staff regulations of the Registry have also been omitted.

This collection of documents should prove of value to lawyers interested in the structure and procedure of the Court. An elaborate index facilitates the use of the volume.

Having finished the preparatory stage, the Court is ready to function. One case only is on its agenda now —the dispute about the mining of the Corfu Channel, between Albania and Great Britain. Lawyers of the world would like to see more cases decided by judicial means, but governments seem to shy away from the Court even where they have accepted the obligatory jurisdiction of the Court. Similarly, proposals to request the Court to give an advisory opinion on matters in dispute, have not met with favor in the General Assembly and the Security Council of the United Nations.

LOUIS B. SOHN
Cambridge, Massachusetts

MARRIAGE IS ON TRIAL. *By John A. Sbarbaro. New York: The Macmillan Company. September, 1947. $2.00. Pages xiv, 128.*

This small but engrossing volume can be read easily at one sitting. Judge John A. Sbarbaro, a member of our Association since 1933, and who presides in one of the world's busiest divorce courts, the Superior Court of Cook County, Illinois, takes as his thesis the proposition that "since divorce is merely the end result of a bad situation, we must face the fact that the trouble is to be found in marriage itself." (This review is supplemental to our comment on the basic problems in our August issue (pages 802-803.))

Few have delved as deeply at first-hand into causes of unhappy mating (and subsequent divorce) and have come up with as cogent a proposal for remedy as has this Chicago jurist who, by the way, finds time to own the Chicago Stags, a professional basketball team, and to be president of two national basketball associations. Since "the trouble is to be found in marriage itself," Judge Sbarbaro devotes much of his book to advice as to the factors which must be found or developed before a marriage will be successful. He points out that while divorce is not a new evil, it is increasingly acute[1] and that its deleterious effects, chief among which is its contribution to juvenile delinquency (which he says should be termed "parental delinquency"), are a pressing social problem.

The author believes that "our hope for the stabilization of the American family lies in teaching our young people how to choose their mates so effectively that they will truly become life partners." To effectuate this goal, he proposes that all applicants for marriage license, in addition to a certificate showing that they have no venereal disease (which certificate is required in many States, including Illinois), should be required to present a certificate of their completion of a course in premarital training and counsel in a marriage clinic established and operated under State auspices. He advises that States should set up a commission made up of "a noted woman educator, an outstanding psychiatrist, a prominent member of the clergy, a doctor, and a leading social worker"—why no lawyer or judge?—who would draw up the premarital educational program (Judge Sbarbaro suggests his own six-lecture outline) to be administered under a "Director of Premarital Education." Does the State have the right to thus interfere with one's desire to get married when he pleases? To this he answers, "When the rights of the individual become a threat to society in general, then they must be controlled by social legislation."

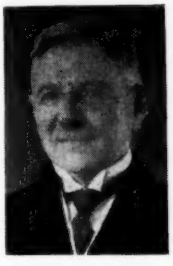
But much as the solution of the divorce problem lies in happy marriage, the divorce laws themselves do not escape his scrutiny. Our present divorce laws "are acutely immoral," he says, "in that they encourage lying, adultery and collusion." That one State (South Carolina) recognizes no ground for a divorce, that New York grants absolute divorce on only one ground, that one State (New Mexico) recognizes "incompatibility" as a ground, and that the number and variety of grounds differ in other States, seems to him not to affect the number of divorces obtained, but leads merely to a challenged shift of domicile or a perjured tailoring of testimony. The "only obvious solution," he urges, is a federal divorce law "which clearly and realistically sets forth grounds in keeping with contemporary thought and behavior." Although his advice is that divorce should be resorted to only when all-out efforts to patch up the marriage have been fruitless, he believes that "we cannot curb divorce by surrounding it with a hopeless legal maze."

1. In 1890, six marriages in 100 ended in divorce. Judge Sbarbaro says that it is now one out of every five. In Cook County it is one out of every three. If the present trend were to continue, by 1965 one out of every two marriages would end in divorce.

INTERSTATE COMMERCE AND TRAFFIC LAW. *By G. Lloyd Wilson. New York: Prentice-Hall, Inc. 1947. $7.35. Pages xxiii, 677.*

This competent volume by the Professor of Transportation and Public Utilities in the Wharton School of Finance and Commerce at the University of Pennsylvania contains a selection of the leading cases and a statement of the guiding principles in transportation and traffic management, including both the legal and the administrative questions arising in all types of transport and traffic. The writing, editing, and indexing, and the authoritative assistance and reviews obtained by the author, combine to make the work very useful to those who may have legal problems in the fields covered.

Lawyers *in the News*



Samuel WILLISTON

■ A heart-warming event in an anxious world was the observance on September 24 of the eighty-sixth birthday of the greatly admired and beloved teacher of law. In many parts of the country, members of law faculties, Harvard alumni, and lawyers who learned wisdom and practicality in his classrooms sent messages of affection to him at his home in Cambridge, Massachusetts.

In Cleveland, the annual luncheon of the Harvard Law School Association was held on his birthday. On the motion of Gurney E. Newlin, of Los Angeles, a former President of the American Bar, the assemblage caused a telegram to be sent to the beloved mentor of many, to hail his natal day, wish him continued good health, and convey to him the "deep respect and abiding affection" of those who had sat at his feet.

WILLISTON was born in Cambridge on September 24, 1861. In *Who's Who* this eminent teacher chooses to describe himself as "Samuel Williston, lawyer", and says he has been "in practice in Boston and Cambridge since 1889". He entered the Harvard law faculty in 1890; his career is a legend and a glory of our profession. His authorship of the Acts to make uniform the law of sales, of warehouse receipts, of bills of lading, of receipts for stock, etc., have been of incalculable value to American business and to all who benefit by certainty and security in commercial transactions. He truly was a teacher who affected no philosophies of revolution, no posture of disdain for precedents, no mantle of messianic leadership for the weakening of law as the great force for justice. He became Dane Professor Emeritus in 1938.

For many years until the past few, he was a regular and much-sought-after personage at meetings of our Association, even on long trips to the West Coast. He became a member in 1891. Modestly he contributed his mature judgment to many projects, but accepted no place of power for himself. In 1928 he was most fittingly awarded the first American Bar Association Medal for "conspicuous service to jurisprudence", amid the acclaim of all who knew his qualities of true greatness. As always in his classrooms, he was especially open to approach by the younger lawyers who had begun to come to our meetings. He will come to us no more; but in his sunset years he has the deep affection and esteem of those for whom he did so much.

As well here as anywhere else, we refer to another incident which gladdened those who were at the Harvard Law School luncheon in Cleveland, presided over by Dean Erwin Griswold, of the Law School and the Advisory Board of the JOURNAL. Also present was the Dean's father, James H. Griswold, still in active practice of the law in Cleveland, who, on the motion of Reginald Heber Smith, was unanimously elected an honorary member of the Law School Association. "When I was in Law School," said Dean Griswold, "I fully expected to come back here to be with my father. I sometimes think I would be better off if I had done that. But of course I am very happy and satisfied where I am."

Charles E. DUNBAR, Jr.

■ When Louisiana College at Alexandria, Louisiana, celebrated its forty-second Founders' Day on October 3, the Distinguished Service Award instituted by its faculty and trustees was presented for the first time, in recognition of service to Louisiana; and the recipient is an indefatigable worker in our Association, of which he has been a member since 1924 and a member of the House of Delegates at various times during the past ten years. Criteria for determining the man or woman to whom the award shall be given were set up by the faculty to be without political or religious stipulation, and on the sole basis of service to the commonwealth, service which merits honor and respect.

DUNBAR was selected by the board of trustees to receive the award, in recognition of his eminent contribution in putting through legislation which set up civil service laws in his State. He was chairman of the Louisiana Civil Service Commission in 1940-42. Attending the presentation exercises were Paul Brown, of Shreveport, who now heads the Commission, J. E. Ratcliffe, a member of it, and Dan Brown, of Baton Rouge, director of the State civil service.

DUNBAR was born in McComb, Mississippi, in 1888. He received his A.B. degree from Tulane University in 1910, his LL.B. degree from Harvard Law School in 1914, and his

LL.B. degree in civil laws from Tulane in 1915. He has practised law in New Orleans since 1915, aside from his service as a 1st lieutenant and captain in the Army in World War I. He was a professor of law at Tulane from 1916 to 1940.

In our Association, he has been a member of the Council of the Section of Legal Education and chairman of the Section. In 1931 he was president of the Louisiana Bar Association. He is a member of the Advisory Board of the JOURNAL.

Although his effective leadership for civil service legislation was singled out as ground for the award, its bestowal could have been justified on any or all of several other distinguished services to his State and his profession. He has for years been a skillful and untiring organizer and leader in efforts for good government against the Huey Long "machine", for resistance to political control of the organized Bar in the State and political control of education—in fact, a tireless worker in many good causes. His career at the Bar and in public affairs typifies the kind of disinterested, diligent public service which is sought to be encouraged by our Association's new Committee on Lawyers' Participation as Citizens in Public Affairs. Appropriately, he is a member of it.

The high quality of DUNBAR's civic leadership is exemplified by the Founders' Day address which he delivered at the time of the award.

"Except for the calamity tragedy of another world war, the greatest danger to the economic, spiritual and political life of our Republic and the peace of the world today is the growing lack of civic patriotism and increasing indifference and alarming neglect of civic duty on the part of our citizens," DUNBAR said. "Men talk loudly of their rights, but very rarely of their duties and responsibilities. Busy with our selfish and private pursuits, we are abandoning in a large measure our individual duty and responsibility in preserving our democratic institutions and solving our social, economic and governmental problems."

Colgate Whitehead DARDEN, JR.

■ Another practicing lawyer and effective public servant who has left the practice of our profession to undertake leadership in American education is the scholarly former Governor of the State of Virginia, who was inducted on October 1 as the President of the University of Virginia.

DARDEN was born in Southampton, in the Dominion State, in 1897. He took his A.B. degree at the institution he now heads, his M.A. and LL.B. degrees at Columbia University. He held a Carnegie fellowship at Oxford University in England, and served with the United States Marine Corps, and also with the French Army, in World War I. After he had been admitted to the Bar and had begun the practice of law in Norfolk, Virginia, he served for two terms in the Virginia General Assembly (1930-33), and then was elected to Congress, first at large for the 73rd Congress (1933-35), and then from the Second Congressional District for the 74th, 76th and 77th Congresses (1935-37, 1939-41), but resigned during his second term to become a candidate for Governor. He was elected Governor and served for a term which expired in January of 1946.

In ceremonies attending his inauguration as third President of the University in the presence of 4000 educators, faculty members, alumni, citizens of Virginia, and students of the University, on the famous lawn at Charlottesville, Dr. DARDEN called on American colleges and universities to supply active and trained leadership in making peace and the rule of law possible again in the disordered world of today. Representatives of more than 200 colleges and learned societies marched in the academic procession.

Former Governor DARDEN warned of the dangers inherent "in the turbulence, dislocations and the animosities which afflict American life today," and added:

> There appears to be no longer a common tie which binds our people together. Unless we can achieve a spiritual unity capable of checking the distrust, suspicion and moral irresponsibility which poison the very springs of our existence, we have before us bleak and barren years.

If our country is to escape "very bitter days," President DARDEN continued, it is necessary for higher education to assume active and aggressive leadership in a world that is gradually sinking beneath the weight of "futility and despair."

Stressing the part that the University of Virginia has traditionally taken in providing trained and patriotic leadership, he declared that the time may be rapidly approaching when the University cannot accommodate all those who may want to receive an education there. This fall 5000 students are attending its classes —almost twice the pre-war figure.

A series of two-year colleges in Virginia, open to men and women, was suggested by President DARDEN as a possible answer to the problems of over-crowding. He said that such colleges, placed in strategic parts of the State, would act as a screening agency for the University.

Facing the problems to which the American Bar Association is giving active consideration, President DARDEN emphasized the importance of developing a strong adult education program, as well as sound training for the professions. He said that 75 per cent of high school graduates do not continue their education, yet they become powerful factors in the political life of the country. He declared that an adult program, sponsored by the University and brought into the community itself, would prove highly effective in training non-college men and women for their part in public affairs.

Faris Bey el-KHOURI

■ One of the most capable and interesting personalities in the General Assembly of the United Nations is the Chairman of the Delegation of Syria, who has been its representative in the Security Council and at the present (second) regular session of the Assembly is the Chairman of its pivotal and overworked Committee No. 6 (Legal). The variety of his experience and the quality of his scholarship and skill typify the reasons why delegates of small states have large influence in the deliberations of the "town meeting of the world".

Born in Kfeir in 1879, Faris Bey EL-KHOURI studied at the American University of Beirut where he obtained his B. A. degree in 1897. He stayed on at the University, teaching history, until 1900. In 1908 he began to practice law in Damascus and has been prominent in the legal profession ever since, despite the fact that from 1914 until the present day he has been best known as one of the leading political figures in his country.

From 1914 to 1918 he was the deputy from Damascus to the Ottoman Parliament in Constantinople. He then became Counsellor of State and held successively the posts of Minister of Finance in the Arab Government under King Faisal (1920), Deputy from Damascus to the Syrian Federal Council (1922), Minister of Public Instruction (1926), Member of the Syrian Delegation to Paris (1936), Chairman of the Syrian Delegation to the Parliamentary Congress in Cairo (1938), and Deputy from Damascus to the Syrian Parliament and Speaker of the House (1943). He was elected Prime Minister in 1944, in which post his period of office ended in October, 1946.

During 1945 he was also the Chairman of the Syrian Delegation to the Arab League Congress, the San Francisco Conference of International Organization, and the organizational meeting of the General Assembly in London early in 1946. In addition to the many political posts he held, he was also Syrian professor of law at the Syrian University in Damascus from 1919 to 1940 and President of the Syrian Bar Association from 1921 to 1926. He is a Member of the Arab Academy and of various other business and scientific associations in Syria and Lebanon. In Syria's unique economy, this leader of the Bar is, for example, President of the Board of Directors of the National Cement Society, a director of the Spinning and Weaving Society, and member of the Association of Graduates of High Scientific Associations. He is the author of a work on public finance and one on legal procedure, both in Arabic.

Jesse Paine WOLCOTT

■ At their recent meeting in the State Bar of Michigan the lawyers of that State acclaimed one of their number who, as Member of Congress from the Port Huron district, received the Collier's Award for conspicuous and meritorious legislative service in 1946.

WOLCOTT was born in Gardner, Massachusetts, in 1893. He was educated at the Detroit Technological Institute and the Detroit College of Law. He began the practice of law in Detroit, but moved to Port Huron. In World War I he served as a 2nd lieutenant in the 26th Infantry, 1st Division, machine gun company, and took part in the Meuse-Argonne offensive. He has been State Commander of the V. F. W.

In Port Huron he was assistant police judge and later the prosecuting attorney of St. Clair County. He has been a member of the 72nd to the 78th Congresses (1931-1945), and has made a favorable record for diligent and constructive performance of his legislative duties. He is the Chairman of the important Committee on Banking and Currency and a member of the Joint Committee of the Senate and House on The Eonomic Report of The President (Public Law 304 — 79th Congress, 2nd Session; S. 180; Chapter 33, 2nd Session).

Joseph B. SCHEIER

■ This member of the Wisconsin Bar, veteran of World War II and member of our Association since 1945, has been appointed by the Secretary of War to the War Department's Special Staff, to be the attorney for the Anti-trust, Cartels and Controls, Economic and Scientific Section, at the General Headquarters of the Supreme Command for the Allied Powers, in Tokyo, Japan.

SCHEIER was born in Milwaukee, but went to school in Spokane, Washington. His B.A. and LL.B. degrees were from the University of Wisconsin, and he practiced law in Milwaukee. In World War II he was

in the headquarters company of the 30th Infantry Division. After he was discharged from the army, he served awhile as Price Attorney and Chief of the Consumers' Goods and Service Section in the Price Division of the Milwaukee district of the OPA. Soon after V-J Day, he resigned to resume the practice of law. He is a member of the American Legion, the AVC, and the Wisconsin State and Milwaukee Bar Associations.

Improved Procedures Proposed for Anti-Trust and "Unfair Trade Practice" Questions

■ Our Association's cooperative efforts to be of help in bringing federal laws and administrative practices abreast of present-day needs of business operations were advanced at a joint meeting of the American Bar Association and the Chicago Bar Association in Chicago on October 13. President Tappan Gregory of our Association, a former President of the Chicago and Illinois Bar Associations, was in the chair. Federal Trade Commissioner Lowell B. Mason, of Illinois, submitted to members of the Bar his proposals for "stream-lining" the operations of the FTC to permit American business to cope with the changed and increasing needs of our country and the world.

Speaking for himself and not for the Commission, Commissioner Mason declared that the relations of the federal government and business have not kept pace with the change in conditions since the Federal Trade Commission Act was passed by Congress thirty-three years ago. He pointed out that the United States, with six per cent of the world's population, is now doing forty per cent of the world's productive work.

"It's up to the lawyers of this country to give serious thought to the present-day tendency toward the stifling of that creative spirit," he said. "The sooner we drop the question of relationship between Government and business from its present political status and deal with the problem on a non-partisan basis the better off we will be."

As reported by the New York *Times,* Commissioner Mason urged that the Bar should inquire whether there are racketeering and monopoly practices in governmental bureaucracy. "Instead of talking about the vested interests in business, we should look to see whether there be vested interests in agencies of Government and monopoly in bureaucracy," he said.

Commissioner Mason stated it to be his opinion that the FTC is replete with authority but lacks sufficient means of enforcement. He said:

"The confusion about the laws of commerce has become so universal that it imperils our American system of free competition. I am inclined to think the error has grown too big for a few superbrains in Washington to remedy."

Commissioner Mason said that his proposals contemplate that business and the FTC would be put in a position to discuss complaints of unfair trade practices before civil or criminal prosecution is brought by the Government. He said that hit-and-miss prosecution, which is now the practice, is not solving the problems.

Commissioner Mason stressed the fact that the House of Delegates, on the recommendation of the Association's Committee on Commerce, had approved in Cleveland in September a proposal that the Department of Justice and the FTC should provide a consultative service for businessmen and their legal advisers and that a business concern or group be exempt from criminal prosecution after it had gained clearance in good faith for a proposed course of action. (See 33 A.B.A.J. 706; July, 1947; 33 A.B.A.J. 773; August, 1947).

The speaker declared that his proposals would simplify procedures and would eliminate in the fairest and most effective way, on an industry-wide basis, such acts and practices as are prohibited by the anti-trust laws. He emphasized that his proposals would in practical operation be in no manner similar to the course pursued under the National Industrial Recovery Administration, which he said he vigorously opposed at the time it was brought forward.

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Review of Recent Supreme Court Decisions

by **Edgar Bronson Tolman***

FEDERAL STATUTES

Robinson-Patman Act—Action to Recover Price of Goods—Defense that Plaintiff Violated Act by Giving Others Illegal Discounts

Bruce's Juices, Inc. v. *American Can Co.*, 91 L. ed. Adv. Ops. 875; 67 Sup. Ct. Rep. 1015; U. S. Law Week 4407 (No 27, decided April 7, 1947).

Petitioner, Bruce, gave renewal notes to American Can Company for the balance due on a running account for purchases of cans. In an action brought in a state Court for recovery on the notes, Bruce pleaded that the notes were void because American had sold cans to others at prices which discriminated against Bruce and that thereby American had violated the Robinson-Patman Act. The alleged discrimination consisted chiefly of quantity discounts. Bruce itself had accepted discounts applicable to the quantity of its purchases. The Florida Supreme Court overruled the defense of Bruce. On certiorari this was affirmed. Mr. Justice JACKSON delivered the opinion of the Court.

Various arguments in support of the defense are discussed and rejected. The decision rests chiefly, however, on the ground that the correct interpretation of the Robinson-Patman Act does not support such a defense as that interposed by Bruce.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE joined.

H.

The case was argued by Messrs. Thurman Arnold and Cody Fowler for Bruce's Juices, and by Mr. John Lord O'Brian for the American Can Company.

Federal Food, Drug and Cosmetic Act of 1938—Penalty for Giving False Warranty—Application to Intrastate Sale

United States v. *Walsh, Trading as Kelp Laboratories*, 91 L. ed. Adv. Ops. 1175; 67 Sup. Ct. Rep. 1283; U. S. Law Week 4559 (No. 718, decided May 19, 1947).

Kelp Laboratories gave one of its customers a continuing guaranty that none of the products Kelp shipped to the customer would be misbranded or adulterated within the meaning of the Federal Food, Drug, and Cosmetic Act of 1938. Kelp, having shipped to the customer goods which had been adulterated, in breach of the guaranty, was prosecuted for violation of § 301 (h) of the Act. The shipment moved only in California, and was not interstate.

Mr. Justice MURPHY, reversing the District Court, held that "§ 301 (h) definitely proscribes the giving of a false guaranty to one engaged wholly or partly in interstate business irrespective of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. Such a construction is entirely consistent with the interstate setting of the Act."

Mr. Justice JACKSON delivered a dissenting opinion.

H.

The case was argued by Mr. Robert S. Erdahl for the United States, and by Mr. Eugene W. Miller for Walsh.

Social Security Act—The Employer-Employee Relationship

Bartels v. *Birmingham*, 91 L. ed Adv. Ops. 1584; 67 Sup. Ct. Rep. 1547; U. S. Law Week 4773 (Nos. 731 and 732, decided June 23, 1947).

This was an action brought to recover taxes paid by dance hall proprietors under the Social Security Act. The District Court granted recovery and the Circuit Court of Appeals reversed. The Supreme Court took the case on certiorari, reversed the Circuit Court and affirmed the judgment of the District Court. Mr. Justice REED delivered the opinion of the Court.

The nature of the controversy is stated in the opinion as follows, "Recovery depends on whether petitioners' arrangements for bands to play at the dance halls made the band leaders and members of the bands employees of the petitioners or whether, despite the arrangements, the leaders were independent contractors and therefore themselves the employers of the other members."

The facts may be briefly re-stated from the opinion as follows: The dance hall proprietors furnished the piano and a few other facilities. The band leader selected and employed the band members and prescribed what they should do and how they should do it. The employment arrangements were for "one-night stands." The band leader fixed the pay, received payment of an agreed sum from the dance hall proprietors, paid the traveling expenses and the salaries of his men. The surplus was his profit and any deficit was his loss. On the other hand, the form of contract, adopted by the American Federation of Musicians and used here, contained a clause, "the ballroom operator is the employer of

*Assisted by James L. Homire and Edmund Ruffin Beckwith.

the musicians and their leader."

The Internal Revenue office issued directives advising collectors that where the form of contract employed here was used, the operators of amusement places would be liable as employers under the Social Security Act. The taxing authorities had contended that they might rely upon the voluntary contract of the parties by which they shifted the tax liability. This argument the Court refused to accept and held that the band leader was the real employer, that the order of the Commissioner of Internal Revenue exceeded his statutory authority, and that the dance hall proprietors could recover payment of the taxes paid by them.

Mr. Justice DOUGLAS with whom Mr. Justice BLACK and Mr. Justice MURPHY concurred, delivered a dissenting opinion, based upon the proposition that, where parties to an enterprise fix their relationship by a contract, the taxing authority has the right to take that contract at face value so far as that contract affects the question of who should pay the tax. T.

The case was argued by Mr. Thomas B. Roberts and Mr. Clyde B. Charlton for Bartels and by Mr. Robert A. Wilson for Williams, and by Mr. Robert L. Stern for Birmingham.

Home Owners Loan Act of 1933—Validity of Provisions Authorizing Appointment of Conservator

Fahey v. *Mallonee,* 91 L. ed. Adv. Ops. 1574; 67 Sup. Ct. Rep. 1552; U. S. Law Week 4694 (No. 687, decided June 23, 1947).

A specially constituted federal District Court in the Southern District of California held unconstitutional § 5 (d) of the Home Owners Loan Act of 1933, as constituting a delegation of legislative functions without adequate standards of action or guides to policy. On a direct appeal to the Supreme Court the judgment was reversed. Mr. Justice JACKSON delivered the opinion of the Court.

The question arose in a suit by stockholders of the Long Beach Federal Savings and Loan Association to remove the Federal Conservator and others who had taken over the Association under the statute because, as they had found, the concern was being conducted in an unlawful, unauthorized and unsafe manner, and its management was unfit and unsafe and was pursuing a course injurious to, and jeopardizing the interests of, its members, creditors and the public. Under the statute these grounds are such as to warrant the federal officials in taking over the Association for liquidation and in appointing a conservator for that purpose.

The Supreme Court concluded that the standards of the act are the usual ones found in most state and federal banking laws and that they are sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review.

Mr. Justice RUTLEDGE concurred in the result and in the opinion so far as it rests on the ground that § 5 (d) is not unconstitutional. H.

The case was argued by Mr. Oscar H. Davis for Fahey, and by Mr. Wyckoff Westover for Mallonee.

INSURANCE

Surety Bonds for Contractors for Work on Government Buildings—Government's Right Sustained to Set-Off Money Retained Under One Contract for Deficiency on Another

United States v. *Munsey Trust Co.,* 91 L. ed. Adv. Ops. 1588; 67 Sup. Ct. Rep. 1599; U. S. Law Week 4698 (No. 847, decided June 23, 1947).

Aetna Casualty and Surety Company issued two surety bonds, pursuant to the requirements of 40 USC, § 270 (a), as security for the performance by Federal Contracting Corporation of each of six contracts to paint and repair certain federal buildings. One bond was for the timely completion of the work; the other for payment of those furnishing labor and material to the contractor. Each bond assigned to Aetna the contractor's claims for sums due the contractor whenever the surety should be compelled to fulfill the obligations of the contractor. The work was completed on time; but the contractor failed to pay some $13,000 owed for material and labor. This, the surety paid. The Government had retained some $12,400 representing percentages of progress payments due the contractor. After the contracts above referred to were made, the contractor successfully bid on work in St. Louis, but failed to enter into the contract bid upon. Another contractor did the work at an increase in price of some $6700. A receiver appointed to collect for Federal demanded the full amount of the retained percentages under the first contracts, but the General Accounting Office deducted the Government's outstanding claim under the later contract and paid over only the balance, $5713.53. The question at issue is whether the Government may set-off the damages due under the later contract against moneys retained under the contracts previously made.

Reversing a judgment of the Court of Claims in favor of the receiver suing to collect for Aetna, the Supreme Court sustained the Government's set-off. Mr. Justice JACKSON delivered the opinion of the Court. The opinion is devoted chiefly to a discussion of the theory of subrogation advanced on behalf of the surety as the basis of its right to recover. It is pointed out that the materialmen and laborers whose claims were paid by Aetna had no lien on Government buildings to which it could be subrogated and none on the retained percentages.

Mr. Justice BURTON dissented.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case. H.

The case was argued by Mr. Philip Elman for the United States and by Messrs. Alexander M. Heron and W. Braxton Dew for Munsey Trust Co.

INTERNATIONAL LAW

Effect of War on Prior Treaties Between Warring Countries—The Right of Foreign Nationals to Inherit Real and Personal Property Located in the United States

Clark v. *Allen,* 91 L. ed. Adv. Ops. 1285; 67 Sup. Ct. Rep. 1431; U. S.

Law Week 4621 (No. 626, decided June 9, 1947).

The questions here involved are the effect of war upon a treaty previously made by the warring countries and the effect of the war on the rights of nationals of the contracting parties who claim by inheritance or devise under that treaty.

Alvina Wagner, a resident of the State of California, died in 1942 leaving a will giving her real and personal property to residents of Germany. Her California heirs claimed the property by a suit filed in a state court. Trial of that suit was prevented by the action of the Alien Property Custodian who brought this suit for a determination that the California heirs had no interest in the estate because of a' treaty with Germany in 1923. That treaty provided that the nationals of either of the "High Contracting Parties" might receive, by gift or will, real property from a citizen of the other contracting party, giving them a period of three years in which to sell the same. The right was given to a citizen of either of the countries to transfer personal property in the other country to nationals of either country. The District Court gave judgment for the Custodian on the pleadings. The Circuit Court, Ninth Circuit, reversed, holding that the District Court was without jurisdiction. The Supreme Court reversed and remanded the cause to the Circuit Court for consideration of the merits, whereupon the Circuit Court held for the California heirs. The Supreme Court again took the case on certiorari and reversed the Circuit Court as to the real property and affirmed as to the personal property.

Mr. Justice DOUGLAS delivered the opinion of the Court.

On the controlling question Mr. Justice DOUGLAS declared: "The outbreak of war does not necessarily suspend or abrogate treaty provisions. . . ."

He next takes up the interpretation of the difference of the provisions of the treaty as to real and personal property after an examination of those relative provisions and the review of prior decisions. As to the questions of law here involved, the conclusion of the Court is as follows: "So far as realty is concerned, the testator included 'any person'; and the property covered is that within the territory of either of the high contracting parties. In case of personalty, the provision governs the right of 'nationals' of either contracting party to dispose of their property within the territory of the 'other' contracting party."

The conclusion is therefore reached that the treaty does govern the disposition of the realty but does not govern the disposition of the personalty unless Alvina Wagner, the testatrix, was a German national. Until her nationality is decided the rights of the respective claimants cannot be determined as to the personalty. The case was remanded to the District Court for further proceedings.

Mr. Justice RUTLEDGE concurred in the holding of the Court as to the real estate, but as to the personal estate he thought that the case should be remanded for a hearing as to that issue without commitment by the Court in advance of a more complete knowledge of the facts in relation thereto. T.

The case was argued by Mr. Harry LeRoy Jones for Clark and by Mr. S. C. Masterson for Allen.

INTERSTATE COMMERCE

Sherman Anti-Trust Act—Restraints on Sale of Taxicabs—Restraints on Obtaining Exclusive Contract for Operation Between Railroad Stations

United States v. *Yellow Cab Co.*, 91 L. ed. Adv. Ops. 1594; 67 Sup. Ct. Rep. 1560; U. S. Law Week 4716 (No. 1035, decided June 23, 1947).

The complaint here was filed under § 4 of the Sherman Anti-Trust Act, to restrain alleged violations of §§ 1 and 2 of that Act. A motion to dismiss was sustained by the federal District Court for Northern Illinois. On appeal the Supreme Court reversed. Mr. Justice MURPHY delivered the opinion of the Court.

The allegations were designed to state charges that the defendants had combined and conspired to restrain and monopolize interstate commerce in (1) the sale of taxicabs to principal cab operating companies in Chicago, Pittsburgh, New York City, and Minneapolis, and (2) the business of furnishing cab services for hire in Chicago and vicinity.

The conspiracy is said to have had a three-fold effect in that (1) it excludes other manufacturers of taxicabs from 86 per cent of the Chicago market, 15 per cent of the New York City market, 100 per cent of the Pittsburgh market and 58 per cent of the Minneapolis market, (2) it eliminates Yellow Cab Company and Cab Sales and Parts Corporation (affiliated with the other defendants) from competing with Parmelee in making contracts with railroads for transporting passengers and luggage between railroad stations in Chicago, and (3) it excludes others from engaging in carrying interstate travelers to and from Chicago railroad stations.

As to the first two aspects the Court holds that the complaint is sufficient to state causes of action. On the first aspect the conclusion reached is that an appreciable amount of interstate commerce is affected and subjected to unreasonable restraint and that it matters not that the conspiracy is formed between companies that are affiliated under a common ownership, if the allegations are true.

As to the second phase of the case, it is conceded that exclusive contracts may be made with taxicab service companies, *Donovan* v. *Pennsylvania*, 199 U. S. 279. But a conspiracy to eliminate competition in the obtaining of such a contract violates the Sherman Act.

Finally, the question of local transportation by taxicabs in Chicago is considered. The conclusion is reached that, as a practical matter, interstate commerce is not involved in the transportation of passengers and their luggage from points in the city to the railroad stations. But the Court carefully points out that no absolute rule is intended to be laid down that this service is be-

yond the reach of federal power.

Mr. Justice BLACK and Mr. Justice RUTLEDGE agreed with the rulings on the first two points, but dissented as to the third.

Mr. Justice BURTON concurred as to the third ruling, but thought the complaint failed to state a cause of action.

Mr. Justice DOUGLAS did not participate. H.

The case was argued by Mr. Charles H. Weston for United States and by Messrs. A. Leslie Hodson and Harold S. Lynton for Yellow Cab Co.

LABOR LAW

National Labor Relations Act — Overtime Pay—Exemption of Men Employed in Executive Capacity with Discretionary Power

Walling v. *General Industries Co.*, 91 L. ed. Adv. Ops. 799; 67 Sup. Ct. Rep. 883; U. S. Law Week 4404 (No. 564, decided March 31, 1947).

The administrator of the Wage and Hour Division of the Department of Labor filed complaint in a District Court of the United States, charging failure to pay time and one-half for statutory overtime. The employees were engineers in charge of a critically important power plant which furnished steam and air power for a plastic plant.

The District Judge heard the evidence of the contending parties without a jury, made special findings of fact, and concluded that the engineers, within the meaning of Section 13 (a), were "employed in an executive capacity" and "customarily and regularly exercise discretionary powers," and that therefore the employer was not obliged to pay them time and one-half for overtime. Judgment was therefore entered for the employer. The Circuit Court of Appeals affirmed. The Supreme Court took the case on certiorari and affirmed the judgment of the District Court.

Mr. Chief Justice VINSON delivered the opinion of the Court.

He sustained the conclusions of the District Court in all particulars.

Mr. Justice RUTLEDGE delivered a dissenting opinion in which Mr. Justice BLACK and Mr. Justice MURPHY joined.

T.

The case was argued by Mr. George M. Szabad for Walling, and by Mr. Glen O. Smith for the Company.

Longshoremen—Compensation Act —Claims Against the United States —Public Vessels Act of 1925

American Stevedores v. *Porello*, 91 L. ed. Adv. Ops. 733; 67 Sup. Ct. Rep. 847; U. S. Law Week 4346 (No. 69, decided March 10, 1947).

In an opinion by Mr. Justice REED, the Court held that the Public Vessels Act of 1925 gave federal employees a cause of action against the United States when they have been tortiously injured; not only for injury to property, but also for injury to the person. The Court also held that the right to relief was not lost by the acceptance of compensation payments under the Longshoremen's Compensation Act.

Mr. Justice FRANKFURTER delivered a dissenting opinion in which the CHIEF JUSTICE concurred. T.

The case was argued by Mr. Edward Ash for American and by Mr. Jacob Rassner for Porello.

MARITIME LAW

State Law Governs as to Right of Business Invitee on a Ship in Harbor Against One Having No Control over Premises

Caldarola v. *Eckert*, 91 L. ed. Adv. Ops. 1566; 67 Sup. Ct. Rep. 1569; U. S. Law Week 4733 (No. 625, decided June 23, 1947).

The S. S. *Everaga*, though owned by the United States, is managed by the respondent Eckert Company as General Agents. While the ship was being unloaded by Jarka, a stevedoring concern, under a contract with the United States, the petitioner, Caldarola, an employee of Jarka, was injured. Caldarola claimed that the injury was caused by a defective boom. The contract between Jarka and the United States provides that the War Shipping Administrator "shall furnish and maintain in good working order" all necessary equipment. Caldarola sued Eckert in a New York Court to recover damages for the injury. The New York Court of Appeals sustained the setting aside of a verdict for Caldarola on the ground that under New York law the relation which the General Agents bore to the vessel did not make them responsible to a third person for its condition.

On certiorari, this ruling was sustained by the Supreme Court. Mr. Justice FRANKFURTER delivered the opinion of the Court. He points out that as Caldarola complained of a maritime tort, he could have sued the United States in Admiralty; but he chose rather to sue in New York, presumably to obtain the benefit of a jury trial. By the Judiciary Act of 1789, a maritime tort is suable in state Courts, as it "saves to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The effect of this statute is said to be not clearly defined in the cases, but "whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its Courts for such a business invitee against one who has no control and possession of premises."

The Court rejects the contention that the contract makes the General Agents the owners, *pro hac vice*, of the vessel.

Mr. Justice RUTLEDGE delivered a dissenting opinion. In his discussion of various aspects of the case he expressed the view that the maritime tort is a creature of federal law, on which the state Court does not have the final word, and that the federal law does not require and should not permit the result the Court reaches.

Mr. Justice DOUGLAS also delivered a dissenting opinion arguing that, for the reasons stated in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 734, the General Agents were the owners, *pro hac vice*, of the vessel.

Mr. Justice BLACK and Mr. Justice MURPHY concurred with Mr. Justice DOUGLAS. H.

The case was argued by Mr. Abraham M. Fisch for Caldarola and by Mr. Raymond Parmer for Eckert.

MILITARY LAW

Status of Guards Under the Wagner Act

NLRB v. *E. C. Atkins & Co.*, 91 L. ed. Adv. Ops. 1157; 67 Sup. Ct. Rep. 1265; and *NLRB* v. *Jones & Laughlin Steel Corp.*, 91 L. ed. Adv. Ops. 1167; 67 Sup. Ct. Rep. 1274; U. S. Law Week 4549 and 4554 (Nos. 419 and 418, decided May 19, 1947).

On certiorari to the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case and the Sixth Circuit in the second case, the Supreme Court reversed. Mr. Justice MURPHY delivered the opinions.

The War Department required contractors to employ certain civilian guards and under an Executive Order enrolled them as civilian auxiliaries to the military police. The guards were commanded by their own civilian officers subject to a commissioned officer of the Army who had charge of guard forces at various plants in a district.

When the Atkins company had employed sixty-four guards a union petitioned for their organization. The NLRB decided that they constituted an appropriate unit and ordered an election in which the same union which represented production employees and plant protection employees of other employers was chosen as bargaining representative. The company refused to bargain and the Circuit Court of Appeals declined to enforce the Board's order on the ground that the guards were militarized and that enforcement of the order "would be or would likely be inimical to the public welfare."

The opinion rejects the contention that militarization affected the status of the men, in general because it was limited to protective duties and did not affect wages and working conditions, and rejected the contention as to the public welfare on the ground that it would be a question of fact whether unionization might "decrease the loyalty and efficiency of the guards". After all these proceedings, including a previous petition to the Court (325 U. S. 838), the guards were demilitarized and then deputized as members of a municipal police force.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice JACKSON dissented

The Jones & Laughlin company employed militarized guards under similar conditions, but in this case the union chosen in the election of the guard union was the same as the one which represented the production employees in the plant, the guards being organized in a separate bargaining unit of that union. The company refused to bargain and substantially similar proceedings as in the *Atkins* case resulted. The Court holds that if the guards were not permitted to choose the same union their rights would be "distinctly second-class" because no other union might be willing or able to deal with the employer, and it points out that the War Department did not require a different choice. With respect to the status of the guards as deputized policemen, the Court holds that they do not thereby become municipal employees for all purposes or cease to be employees of the company and that, as a matter of law, it should not be assumed that union membership will qualify their loyalty.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER, Mr. Justice JACKSON and Mr. Justice BURTON dissented for substantially the reasons assigned by the Circuit Court of Appeals. E.B.

No. 419 was argued by Miss Ruth Weyand for NLRB, and by Mr. Frederic D. Anderson for the Company; No. 418 was argued by Miss Weyand for NLRB, and by Mr. John C. Bane, Jr., for the Corporation.

Selective Training and Service Act—Veteran's Rights to Re-Employment and Seniority

The Trailmobile Company et al. v. *Whirls*, 91 L. ed. Adv. Ops. 939; 67 Sup. Ct. Rep. 982; U. S. Law Week 4435. (No. 85, decided April 14, 1947.)

Certiorari to the Circuit Court of Appeals for the Sixth Circuit was granted because the decision of that court (154 F. 2d 866) rendered before the Supreme Court decided *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, did not conform to the ruling in the *Fishgold* case.

Both cases are concerned with the rights of a veteran under Section 8 of the Selective Service Law to be reemployed upon his return, and with his seniority as affected by his absence in military service. "The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces. Here the question concerns the duration of the veteran's restored statutory seniority standing."

The courts below held that the respondent's seniority and other incidents of his employment extended beyond the statutory year. The Supreme Court reversed. Mr. Justice RUTLEDGE delivered the opinion

The decision turns upon the conclusion that in "freezing" the veteran's right to his job for one year the statute does not "freeze" for any longer period the "other rights" incidental to the employment such as seniority, status and pay. The Court rejects the Government's contention that those rights are protected for an indefinite period or even for a "reasonable period" longer than one year, but it expressly reserves decision upon whether all protection afforded by the statute ends with the year.

Mr. Justice JACKSON, with whom Mr. Justice FRANKFURTER joined, dissented on the ground that while Congress limited to one year the right to have a job, it thereby assured to the veteran the status which would have existed if he had remained at work and "did not take away that status at the end of twelve months", so that it necessarily follows that if a seniority system exists within the employer's organization the veteran is entitled to its protection as long as he actually remains in the employment.

E. B.

The case was argued by Mr. Philip J. Schneider for Trailmobile Co. and by Mr. Frederick Bernays Wiener for Whirls.

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Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE Elizabeth B. A. Rogers . . ASSISTANT

Aliens . . "absence from the U. S." as used in the naturalization laws means absence voluntarily initiated . . alien taken from U. S. territory to Japan by enemy forces not "absent" from U. S.

■ *In re Yarina, Jr.*, U.S.D.C., N. Ohio, E. D., August —, 1947, Freed, D. J. (Digested in 16 U. S. Law Week 2129, September 23, 1947.)

The evidence showed that the petitioner for naturalization had been captured by the Japanese on December 23, 1941, while he was employed on Wake Island (which is part of the U. S.) and that he had returned to the U. S. on October 11, 1945, when liberated. It was the contention of the Commissioner of Naturalization and Immigration that his incarceration deprived him of his right to be naturalized since the establishment of a continuous legal residence in the U. S. for the three years preceding the filing of the petition was required and 8 U. S. C. § 707 provided that "Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship . . . shall break the continuity of such residence . . .". Judge Freed agreed with the Commissioner that the naturalization statutes must be strictly construed, but he interpreted absence from the U. S. to mean absence voluntarily initiated. Emphasizing that it was not gratitude for petitioner's acts of bravery which brought the Court to its decision, he concluded that the petitioner had never left his residence in the U. S. within the purview of the statute and granted the petition. Cases of voluntary departure followed by enforced absence were distinguished.

Appeal . . order not final and appealable where obtained at suit of custodian of alien property and where holding that defendant receiver has no title to claim against co-defendant.

■ *Clark* v. *Taylor*, C. C. A. 2d, September 22, 1947, Clark, C. J.

On June 12, 1941, a N. Y. court appointed one Propper temporary receiver of the assets in N. Y. of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (AKM), an Austrian organization. On June 14, 1941, the President, by Executive Order 8785, prohibited transfer of Austrian property unless authorized by the Secretary of the Treasury, who did not authorize any transfer of AKM assets. On July 29, 1941, Propper's appointment was made permanent and, on that date, he brought suit in a N. Y. state court against Taylor, President of the American Society of Composers, Authors and Publishers (ASCAP) to recover royalties allegedly owed AKM by ASCAP. Trial has not been had in the state suit. On September 4, 1943, the Alien Property Custodian, plaintiff's predecessor, vested in himself all assets held by ASCAP for AKM and, upon ASCAP's refusal to turn over the sums allegedly due, brought this suit against Taylor and Propper to secure the turnover and for a declaration that Propper had no right to the fund. The District Court granted summary judgment against Propper on the ground that he lacked title to the fund and from this order Propper appealed. No decision had been reached upon AKM's claim against ASCAP to which Taylor interposed the defense of setoff. Speaking for the Court, Clark, C. J., said: "[T]his is the case of suit by the appropriate government official against two rival claimants to the same fund or chose in action, and . . . there will be a final judgment only when there is a decision as to the existence and ownership of the property in dispute. The conclusion that a fiduciary claiming to represent one of the claimants does not have formal legal title to the assets in question is not a final judgment upon the important and central point in dispute . . . . The theory adopted in the new rules, including the pertinent rule here, 54 (b) F.R.C.P., has been that the 'transaction' or 'occurrence' is the subject matter of a claim, rather than the legal right arising therefrom; additions to or subtractions from the central core of fact do not change this substantial identity so as to support piecemeal appeals. . . ". He suggested that if finality were given the judgment below it might result in closing the district judge's eyes to the authoritative action of the state court.

Frank, C. J., dissented "because this decision has marked precedential significance (since I think it overrules many decisions of the Supreme Court, of this Court, and of other Circuit Courts) and because it is distinctly harmful to both parties to this appeal." He pointed out that, upon entry of a judgment for or against ASCAP, Propper could appeal from the judgment against him and that, if he won, the case would be remanded for a new trial. Thus Propper would be subjected to a long delay and perhaps prejudiced by the first trial while plaintiff would incur the expense of a trial in which he had no interest. In Judge Frank's opinion, the majority were repudiating the decisions holding "that the

test is this: If, despite a so-called 'central core of facts' common to a dismissed claim and a non-dismissed claim, decision with respect to the dismissed claim requires consideration of substantial relevant evidence in addition to that which is relevant to the non-dismissed claim, then the dismissal order is final." He felt that the majority had suggested the correct decision, i.e., that the trial should have been postponed until the state court decided whether a temporary receiver immediately acquired title and that the Circuit Court of Appeals should, at a minimum, remand with direction to postpone the trial pending a state court determination, the judgment to be vacated should the state court hold that a temporary receiver thus obtains title.

Bankruptcy . . stare decisis . . interest on tax claims ceases at date of filing of petition rather than date of payment . . earlier precedents overruled.

■ *In re Union Fabrics, Inc.*, U.S. D.C., S.N.Y., August 13, 1947, Bright, D. J. (Digested in 16 U.S. Law Week 2107, September 9, 1947.)

The Trustee sought a review of the Referee's order allowing interest on tax claims to the date of payment, instead of to the date of filing the bankruptcy petition. Judge Bright stated that were the Court to be controlled by stare decisis the referee's decision was supported by previous decisions "but", he said, "recent decisions of the Supreme Court have shown that precedent is not always to be the guiding star." He pointed out that the general rule was that interest on a debtor's obligations ceased to accrue at the beginning of the proceeding since interest thereafter was considered a penalty imposed because of delay in payment and since it would be inequitable for one person to gain an advantage or suffer a loss by the act of the law in delaying distribution in bankruptcy. In his opinion, it was neither logical, sound, nor just to treat interest on tax claims differently from interest on other claims since such a ruling would compel payment by the general creditors who did not incur the debt and who were not responsible for the delay in payment. He refused to uphold the argument that Congress indicated an intention to retain the previous construction by its failure to revise the applicable law when the Chandler Act was passed in 1938.

Civil Service Commission . . Administrative Procedure Act . . regulations governing appointment, compensation, and removal of hearing examiners announced.

■ Code of Federal Regulations, Tit. 5, Ch. I, Pt. 34, §§ 34.1–34.12 (12 *Fed. Reg.* 6321).

On September 22, 1947, the CSC issued a release stating that it had promulgated a set of regulations to implement the provisions of §11 of the Administrative Procedure Act dealing with questions of appointment, placement, pay and removal of hearing examiners. The release set forth the following decisions on the principal issues presented to it: a Board of Examiners, made up of one person on the Commission's staff and two persons, outstanding in administrative law, from outside the Government, will be established to consider the reappointment to hearing examiner positions of persons now holding such positions and having regular civil service status; incumbents with war service or temporary appointments will be required to compete in an open competitive examination; persons with regular civil service status who wish to be transferred from non-hearing examiner positions to hearing examiner positions, as well as persons who previously held regular civil service positions and who wish to be reinstated to hearing examiner positions, must meet the experience and training requirements of such an examination; an agency wishing to fill a vacancy by the promotion of a staff member must confine its selection to three certified by the Commission from a competitive promotion list to be maintained by it for that agency; and six years of appropriate experience will be required for the higher positions. Recognizing that the Act placed a different type of responsibility upon it from that previously had in relation to positions in the Federal service and that experience would probably indicate the necessity of changing the regulations, the Commission emphasized its willingness to do so. The regulations were published in the *Federal Register* of September 23, 1947, and they became effective upon publication.

Corporations . . American Legion may expel member because of membership in Communist Party.

■ *Reiter* v. *American Legion*, N. Y. Supreme Ct., Spec. Term, Pt. III, N.Y. Co., July 1, 1947, Schreiber, J.

Proceedings had been instituted before the executive committee of a post of the American Legion against Reiter, a member, which charged that he was a member of the Communist Party and which might lead to his expulsion from the organization. Reiter sought an injunction pendente lite to stay the proceedings. It was his contention that the Legion, as a matter of law, was powerless to expel a member on a basis of his political beliefs or affiliations since the Federal enactment incorporating the organization provided that it be nonpolitical. The Legion maintained that Communism was not a political belief in the ordinary sense of the term, but a subversive philosophy seeking the overthrow of our Government. Refusing to determine which contention was correct, the Court held that persons could not evade bars to their Legion membership by organizing themselves as a political party. It stated that the ability to form a political party did not determine whether such persons harbored subversive intentions and that the Legion might conclude that the Communist movement constituted disloyalty to its purposes. The Court also decided that the fact that the Legion existed under a federal statute made it none the less a private association with a right to refuse membership to those whose views, whether or not denominated political, might be obnoxious to it and that such refusal did not violate the

constitutional guaranty of free speech since that guaranty protected individuals against action by governmental authorities only. The injunction was refused.

Courts . . judiciary provisions of new Constitution to be submitted to people of New Jersey.

■ On September 10, 1947, the Constitutional Convention of New Jersey agreed upon a new constitution for the state to be submitted to the people at the general election on November 4, 1947. The proposed Constitution would vest the judicial power in a Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction as opposed to the present judicial system consisting of a Court of Errors and Appeals in the last resort, a Court for the Trial of Impeachments, a Court of Chancery, a Prerogative Court, a Supreme Court, Circuit Courts and inferior courts. The Constitution provides that the Supreme Court shall consist of a Chief Justice and six Associate Justices; the Superior Court will be divided into an Appellate Division, a Law Division, and a Chancery Division, and will consist of such number of Judges as may be authorized by law, but not less than twenty-four. Provision is made for an initial appointment of the Justices of the Supreme Court and the Judges of the Superior Court for a term of seven years. Upon reappointment, they will hold their offices during good behavior. Such Justices and Judges will be retired upon attaining the age of seventy. They, as well as the Judges of the County Courts, must have been admitted to practice law for at least ten years. Thus the present system of lay judges on the Court of Errors and Appeals would be abolished. The rule-making power is vested in the Supreme Court and the Chief Justice is directed to appoint an administrative director of the courts.

Department of Justice . . time for filing alien property debt claims extended.

■ (12 *Fed. Reg.* 5798)

On August 25, 1947, the Attorney General announced a general extension until further notice of the deadline for filing debt claims against debtors whose property was seized as alien property prior to January 1, 1947. Approximately 300 enemy business enterprises and individuals, whose names were published in the *Federal Register* of August 28, 1947 (12 *Fed. Reg.* 5799), were excepted from the order and as to them the deadline of September 2, 1947, was retained.

Federal Tort Claims Act . . where accident occurred prior to effective date of Act, right of action accrued on effective date, not date of accident.

■ *Commissioners of the State Insurance Fund* v. *U.S.*, U.S.D.C., S. N.Y., July 21, 1947, Holtzoff, J. (Digested in 16 U.S. Law Week 2112, September 9, 1947.)

Under the N. Y. Workmen's Compensation law, an injured employee may accept the benefits afforded by the law and may also sue any third party for damages. If he recovers in the damage suit, the insurance carrier (Commissioners of the State Insurance Fund in the present instance) must be reimbursed for the benefits allowed the employee under the Compensation law. If the employee fails to bring such a suit before the expiration of one year from the date such action accrued, the cause is automatically assigned to the insurance carrier and it may retain from any sum recovered one-third of the excess over the allowed compensation. In the present instance, both the insurance carrier and the injured employees were suing the U. S. The injuries occurred on July 28, 1945, when a U. S. Army bomber struck the Empire State Building in New York City. At that time, the law provided that the employee must bring suit against the third person not later than six months after the award of compensation and, in any event, before the expiration of one year from action's accrual date. Subsequently, on August 2, 1946, the U. S. became subject to suit in tort as to claims accruing on or after January 1, 1945, and on January 29, 1947, and March 13, 1947, and the N. Y. law was amended so as to permit an action against a third party to be commenced not later than nine months after the enactment of a law creating, establishing, or affording a new or additional remedy. It was thus the employees' contention that this amendment entitled them to bring suit at any time within nine months after the enactment of the Federal Tort Claims Act whereas the insurance carrier contended that the rights of action had automatically been assigned to it by operation of law at the expiration of one year after the accident, since the cause accrued, not on the date the Act became effective but on the date of the accident. The U. S. defended on the ground that the plaintiffs of neither group were the proper parties plaintiff. Each group moved to strike the defense. In denying the motion as to the carrier but granting it as to the employees, the Court stated: "Suffice it to say that to contend that a substantive right of action exists against a person who is immune from suit and against whom no judicial remedy can be pursued, is not realistic. . . . Such a nebulous right would be but a phantom. . . . [T]he immunity of the United States from suit necessarily implies that no substantive right of action existed against it, and not that there was merely a procedural impediment against its enforcement."

Labor Law . . Labor Management Relations Act of 1947 . . Oil Workers' Union held affiliate of CIO . . right to prosecute representation proceedings withheld where CIO had not filed non-Communist affidavits.

■ *Oil Workers* v. *Elliott*, U.S.D.C., N. Texas, September 8, 1947, Davidson, D. J.

The petitioning union sought a mandatory injunction directing the counting of ballots in a representation proceeding brought by it. Judge Davidson found that it would have been entitled to the injunction except that it was affiliated with the CIO and the fact that the CIO had not filed non-Communist affidavits under the Labor Management Act.

He ruled that plaintiff was barred by the provisions of the Act which denied the right of petition for representation proceedings where the petitioner was a labor organization which was an affiliate or constituent unit of any national or international organization, the officers of which had not filed such affidavits. Commenting upon Congress' right to make such a requirement, Judge Davidson pointed out that Art. 4, § 4 of the U.S. Constitution provides that the National Government shall guarantee to each state a republican form of government, that it is recognized that the Communistic form of government is not a representative form, and that it was a matter of policy for Congress to determine whether to curb the growth of this system which would destroy representative government. (But see *In re Northern Virginia Broadcasters, Inc., infra.*)

Same . . same . . a local union's petition for collective bargaining election may be maintained despite failure of AFL with which it is affiliated to comply with registration and non-Communist affidavit requirements of Act.

■ *In re Northern Virginia Broadcasters, Inc. & Local Union No.* 1215, Case No. 5-R-3049, October 7, 1947, Chairman Herzog and Members Houston and Reynolds.

The regional director had dismissed Local No. 1215's petition for an election on the ground that the Labor Management Act required compliance with §§ 9 (f), (g) and (h) by the national federation with which the local was affiliated as a condition to the maintenance of such a proceeding. Sections 9 (f) and (g) required as such a condition that financial and other union reports be filed periodically and § 9 (h) required each officer of the petitioning organization "and the officers of any national or international labor organization of which it is an affiliate or constituent unit" to submit non-Communist affidavits to the Board. The ruling of the regional director followed those previously handed down by the General Counsel and a U.S. District Court (see *Oil Workers v. Elliott, supra*), but, upon appeal, the Board reversed the regional director and reinstated the petition. Stating that "Candor, and a proper respect for the opinion of the General Counsel, require us to say there can be no categorical answer to this question", the majority decided that the fundamental purpose of § 9 (h), which was to eliminate Communist influence from the U.S. labor movement, would not be achieved by barring unions that had fully complied with the Act from the Board's machinery merely because certain officers of a parent organization over whose status they had only the most remote control might choose not to sign the required affidavits. They pointed out that those unions would be no better off than those which were unable to comply because of the actual presence of Communist officers, that the members of the latter unions would lose all incentive to eliminate such officers in order to comply, and that employers would also be cut off from resort to the Board. As to the definition of "national or international labor organization", the majority said that, in ordinary labor relations parlance, the terms referred to those dominant groups in the labor movement which were affiliated with either the AFL or CIO and that the latter were different from "national" or "international" organizations. They thus ruled that "Congress could not have deliberately intended 'national or international labor organization,' as used in Section 9 (f), (g) and (h), to include the two great national federations. . . ". Member Murdock, concurring specially in the majority opinion, based his decision, first, upon the conclusion that the AFL did not fall within the Act's definition of "labor organization" since it was not generally true that it existed for the purpose of "dealing with employers" on subjects of collective bargaining and, second, upon the belief that the majority's construction of the Act fell within the rule of statutory construction that a statute must be interpreted so as to "subserve" its general purposes rather than to "defeat" them. Member Gray dissented. In his view the AFL was a labor organization within the meaning of the Act. Pointing out that it could not be disputed that the AFL was national and international in character, he said that the majority nevertheless reasoned that Congress did not intend to encompass the AFL within the statutory language. He felt that the major bodies affiliated with the all-inclusive labor organizations were "national or international trade unions" and that, had Congress intended to exclude the all-inclusive organizations, it would have used the term "trade union" rather than "labor organization." As to the majority's argument that his construction would defeat the purpose of § 9 (h), Member Gray said that the argument "flies in the teeth of reality" and "is in essence an attack upon the method adopted by Congress" which "it is not our function to judge."

Same . same . . NLRB cannot appoint, under authorization to appoint for each member "legal assistants" who are outside General Counsel's supervision, a "legal assistant" to advise Board as a whole.

■ Comp. Gen. Dec. B-68738, August 19, 1947. (Digested in 16 U. S. Law Week 2102, September 9, 1947.)

The NLRB wished to appoint a "solicitor" who could advise the Board yet be outside the supervision of the General Counsel. It requested the Comptroller General's opinion upon whether, under the Labor-Management Act, such a "solicitor" could be appointed as one of the Chairman's legal assistants and also serve as legal advisor to the entire Board. Section 3 (d) of the Act provides that the General Counsel shall exercise general supervision over all attorneys employed by the Board other than legal assistants to Board members and § 4 (a) authorizes the Board to appoint attorneys as it finds necessary but provides that such attorneys, other than those employed as "legal assistants" to a Board mem-

ber, may not review hearings or prepare opinions. In the Comptroller General's view, there was nothing to indicate an intention by Congress to permit the "legal assistants" to serve in any capacity to the Board as a whole and consequently there was no authority for the appointment of a "solicitor" who would serve in both capacities.

Same. . National Labor Relations Act . . contracts of unreasonable duration bar representation proceedings during their initial two-year period.

■ *In re Puritan Ice Co.*, Cases Nos. 21-R-3734 and 21-R-3735, NLRB, August 21, 1947, Chairman Herzog and Members Houston and Reynolds. (Digested in 16 U. S. Law Week 2104, September 9, 1947.)

The petitioning union requested an investigation and certification of representatives of the ice company's employees whereas the company and the intervening union objected on the ground, *inter alia,* that the petition was barred by a collective bargaining contract entered into by them in 1946. The petitioner contended that this contract was executed for a period in excess of four years and was therefore of unreasonable duration. The Board agreed with the petitioner on this point but called attention to its previous holdings that such a contract constituted a bar to a determination of representatives during its first operative year, which policy resulted from its decision that contracts for terms exceeding one year were of unreasonable duration. In light of *In re Reed Roller Bit Co.* (33 A.B.A.J. 374; April, 1947) in which the Board held that contracts for two-year terms were not of unreasonable duration, it now held that contracts of unreasonable duration barred representation proceedings during their initial two-year period. The petition was dismissed.

Same . . same . . findings of NLRB which are supported by evidence are binding on courts . . specially concurring judge expresses personal opinion that such ruling violates U.S. Constitution.

■ *NLRB* v. *Robbins Tire & Rubber Co., Inc.*, C.C.A. 5th, May 21, 1947, Hutcheson, C. J. (161 F.(2d) 798).

Judge Hutcheson described the case at bar as "another in that long list of enforcement proceedings, in which, galled by the appearance of unfairness made by a record in which the Board acts as both accuser and judge, the employer rebels against the findings of Examiner and Board as arrived at to accomplish the board's 'pre-determined purpose of punishing the respondent.'" The Board had found that the employer had committed unfair labor practices in violation of the National Labor Relations Act by discharging employees because of their union activities for the purpose of discouraging membership in the union. The Board's petition for an enforcement order was granted since "it is the law . . . that when, as here, evidence is susceptible of two inferences, . . . it is for the Board and not the Court to make the determination whether the cause assigned was the real cause or whether the real cause was antipathy to unions and unionizing activities." Waller, C. J., concurred specially but stated that he did so with reluctance. It was his belief that the jurisdiction conferred upon the federal constitutional courts by § 2, Article III of the U. S. Constitution over cases arising under the Constitution and *laws* of the U. S. could not be taken away from those courts without violating the Constitution. "Nevertheless," he said, "there are some half hundred boards and commissions authorized to make findings of fact which are now held to be binding upon the courts in reviewing their actions if such findings 'are supported by evidence'—not if supported by the weight of the evidence. . . . Any court which cannot review the law and the facts upon which a decision is based is denied the right to exercise the judicial power of administering justice. . . . The right to know the truth is an integral and essential attribute of a court of justice. . . . A finding by an examiner . . . should be deemed *prima facie* correct but should never be submitted in place of the power which the people in their Constitution solemnly and surely committed to their courts."

Securities and Exchange Commission . . Public Utility Holding Company Act . . Rule adopted which exempts companies, whose voting securities are held by trustees of certain non-business trusts, from definition of subsidiary companies of holding companies and from all provisions of Act except §9(a)(2).

■ Code of Federal Regulations, Tit. 17, Ch. II, Pt. 250, §250.12 (12 *Fed. Reg.* 5868).

On August 27, 1947, the SEC announced the adoption, under the Holding Company Act, of Rule U-12 which exempts a public-utility company from the definition of subsidiary companies of holding companies and from all provisions of the Act except §9(a)(2) if (1) its voting securities are held by trustees of an *inter vivos* or testamentary trust created by an instrument executed prior to January 1, 1935; (2) the purposes of such trust are charitable, religious, educational or for the benefit of individuals; (3) the beneficial interests in such trust are not represented by transferable certificates; and (4) the securities held by such trustees are those of a public-utility company which is not itself a holding company.

Same. . oral arguments by participants in hearing before the Commission are limited to one hour.

■ Code of Federal Regulations, Tit. 17, Ch. II, Pt. 201, §201.12 (12 *Fed. Reg.* 6348).

In the *Federal Register* of September 24, 1947, the SEC amended §201.12 of the rules of practice of the Commission by adding after present paragraph (a) a new paragraph (b). The new paragraph provides that only one hour will be allowed for oral argument by any participant and, where the same or similar interests are represented by more than one participant, an aggregate of not more than one hour will be allowed the interests so represented irrespec-

tive of the number of participants, the time to be divided equally among such participants. The Commission may, however, in its discretion, extend, shorten or reallocate the prescribed time.

Trade Marks and Trade Names . . Trade Mark Act of 1946. . fees prescribed under old Act for filing oppositions and appeals are applicable after effective date of new Act in respect to pending application theretofore filed and not amended to come within new Act.

■ Comp. Gen. Dec. B-65661, September 9, 1947. (Digested in 16 U. S. Law Week 2128, September 23, 1947).

Under the old law, the fee for filing an opposition to an application for registration was $10 and the fee for filing an appeal from a decision on such an application was $15, whereas under the Trade Mark Act of 1946 each fee is $25. The opinion of the Comptroller General was requested as to which amount applied to oppositions and appeals filed on or after July 5, 1947, the effective date of the new Act, in respect to applications filed before and still pending on that date, which had not been amended to be brought within the new Act. Section 47 (a) of the Act provides that, in the absence of such an amendment of an application the "prosecution" thereof shall proceed in accordance with the Act under which the application was made. It provides further that the old law shall be "continued in force to this extent and for this purpose only." Section 46 (a) repeals all Acts and parts of Acts inconsistent with the new Act. Thus if the term "prosecution" as used in §47 (a) did not embrace the payment of fees, the fees prescribed in the new Act would apply to every case where the fee was paid on or after July 5, 1947. Stating that nothing in the history of the Act was of aid in determining the question, the Comptroller General decided that §47 (a) contemplated in such cases the filing of oppositions and appeals and the payment of fees therefor as provided in the old law. In his opinion, "prosecution" clearly included the filing of an appeal by an *applicant* and no basis existed for distinguishing such an appeal from opposition or appeal by an opposing party.

War. . veteran's hostility to the officers and directors of company and his inability to work in harmony with them makes it unreasonable to require his reinstatement.

■ *Dacey* v. *Trust Funds, Inc.*, U.S.-D.C., Mass., August 11, 1947, Sweeney, D. J. (Digested in 16 U. S. Law Week 2112, September 9, 1947).

A veteran sought reinstatement in his former employment under the provisions of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App. 308. The employer defended on the ground that he lacked the qualifications for a post of managerial responsiblity. On his return from service he had sought reinstatement and, on refusal by one of his former associates, he told several officers and directors that the company was in dire straits and that the SEC was about to descend upon it and the associate in question. There was no foundation for the statements. The Court found as a fact that the veteran was able to discharge the duties of the position for which he was applying but held that ability alone was not enough for there must also be the willingness and desire to work in harmony with associates. Because of his conduct after his return, it was found that it would be unreasonable to require the veteran's reinstatement.

More "Jurist-Like" Conduct by Hearing Examiners Is Foreseen

■ While he was a Trial Examiner for the National Labor Relations Board and before he was appointed as its General Counsel under the Taft-Hartley Act, Robert N. Denham accepted an invitation to speak on the Examiner's function, before our Association's Section of Administrative Law (see our October issue, page 1036). Fulfilling that agreement to speak, he addressed a large meeting of the Section on September 23.

More "jurist-like" conduct by Hearing Examiners for federal agencies was predicted, and regarded by Mr. Denham as virtually assured. The improvement would be due, he said, considerably to the different and more independent status of the Examiners under the Administrative Procedure Act.

Concerning the conduct of hearings by many Examiners in the post, Mr. Denham said:

> I would be unwilling to suggest that the heads of any of the agencies have deliberately required Examiners to write reports or render decisions to accord with the predetermined ideas of the agency heads. But where the predilections of the topside heads are well known and promotions or other benefits . . . are within their control, there is generally enough force in circumstances to bring about the same result. It is a normal application of the old adage: "Whose bread I eat, his song I sing."
>
> If the Examiner decided to be in accordance with his own principles, but contrary to the philosophies of his boss, he ran the risk of antagonizing the agency and jeopardizing his standing there.

Mr. Denham expressed the opinion that in a controversy before an agency, the government body should show that its decision is motivated by a single desire to deal with issues and the parties in a manner which represents an objective appraisal of the facts and the furtherance of the public interest. Hearings before Examiners, he added, are not contests of skill to the same extent as is Court litigation. They are investigations on behalf of an agency charged with the responsibility for determining all the facts and deciding the questions that have been raised.

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THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

The Rise and Restraint of the "Veto" in the United Nations

■ In view of the current interest in the "veto" clause of the Charter, it may be useful to trace the background of this provision and to outline recent proposals for its improvement.

The word *veto* is of Latin origin. In ancient Rome, the plebeian tribunes had the right to oppose legislative proposals of the Roman Senate whenever the interests of the people required it. They did it by publicly announcing: *"veto"* (I forbid). Such action prevented the putting into effect of these proposals. Similarly, in ancient Carthage a single Senator could prevent any action of the Senate by proclaiming his veto. If such a veto were cast, only through approval in a national plebiscite could the measure be put into effect. In more recent times, in Poland of the Seventeenth and Eighteenth Centuries, the use of *liberum veto*—the right of a single member of the legislature to prevent the adoption of a law by the simple device of crying "I forbid"—led to a complete impotence of the legislature and to complete decay of the Polish Kingdom, which resulted in the loss of its independence in 1795.

The word *veto* has been also used in the past to describe the right of a king or president of a country to prevent the coming into effect of new legislation. The use of the veto by King Louis XVI of France led to his being named King Veto and was one of the final causes for the establishment of the French Republic. In the United States the word *veto* President to return to the Congress, is often applied to the right of the legislation to which he objects. The Congress may then overrule such a veto by a two-thirds vote (*Constitution of the United States, Article I, Section 7*).

In the international field, the word *veto* has seldom been used. For instance, at the Conference of London on Danubian Affairs in 1883, Count Münster, the German delegate, refused the Roumanian claim for representation at the conference on the ground that if a vote were given to Roumania "that country would be placed in a rather undesirable position of being able to impose her *veto* at will" (*British and Foreign State Papers*, Vol. 74, page 1236). On the other hand, until recently most international conferences were based on the rule of unanimity, and almost all decisions required the consent of all participants in the conference. Naturally, if no compromise could be reached, states wishing to accomplish the end of the conference could call together a new conference to which the obstinate dissidents were not invited. In other cases, the minority was willing to abstain from voting, thus enabling the majority to proceed with the business at hand. However, in such cases the majority decision did not bind the abstaining minority until it had adhered to that decision, explicitly or tacitly.

When the League of Nations was established, the decisions of both the Assembly and the Council required the agreement of all the members of the League represented at the meeting, except with respect to procedural matters. The League developed a number of devices to get around this difficult rule. In many instances objectors were cajoled into abstaining rather than dissenting, abstention being considered as equivalent to absence. While not only the permanent members of the Council but also the small states represented on the Council had the right to "veto" a decision, the Assembly held a club over the head of the non-permanent members, as it could, under a resolution of September 15, 1926, decide at any time by a two-thirds majority to proceed to a new election of all the non-permanent members of the Council. A member blocking the will of the majority could be thrown out of the Council in short order and a new more cooperative member could be elected in his place.

The "Veto" Question at Dumbarton Oaks and Yalta

The plan for a new international organization prepared by a special committee of the U. S. Department of State in 1943 contemplated a distinct departure from previous practice. It envisaged a Council of eleven members, four of which (United States, Soviet Union, Great Britain and China) were to have permanent seats, while the seven others were to be elected by regional groups of states. Any decision on enforcement action by the organization was to be taken by an affirmative vote of nine members including at least three votes from among the four permanent members. After consultation with members of the American Congress, this provision was later changed to the requirement of a concurrent vote of all of the permanent members, in matters of enforcement. When the representatives of the United States, the Soviet Union and Great Britain met at

Dumbarton Oaks in 1944, the Soviet Union requested the extension of the rule requiring unanimity of the permanent members to all actions of the Security Council, including those relating to the pacific settlement of disputes. It insisted also that a permanent member should be able to cast an overriding "veto," even in cases in which it is a party to a dispute or is accused of aggression. The other states thought that such provisions would cripple the organization and refused to accede to Soviet demands. In consequence, no provision on voting in the Security Council was included in the Dumbarton Oaks Proposals.

To the Yalta Conference, early in 1945, President Roosevelt brought with him a compromise formula which was accepted by Marshal Stalin. This compromise—the so-called Yalta formula—became the basis of the San Francisco discussions. Its main point was that a party to a dispute shall abstain from voting in the Security Council when the Council is dealing with it under the provisions of the Chapter relating to the pacific settlement of disputes; but that in a case of aggression a concurrent vote of all permanent members, including the one accused of aggression, will be required for any decision on the use of economic or military force against the aggressor. Only on procedural matters an affirmative vote of any seven of the eleven members of the Security Council was to be considered as sufficient.

Debate and Interpretation of the "Veto" in San Francisco

At the San Francisco Conference, the small powers made a strong attack on the Yalta formula. The main fight centered around an Australian amendment to limit its application to enforcement measures and to remove it entirely from the chapter of the Charter which deals with the pacific settlement of disputes. As the five big powers were able to agree upon a united front against this amendment, they succeeded in lining up enough small powers to defeat the Australians by a vote of 20 to 10, while fifteen states abstained.

The discussion of the Australian amendment led to a disclosure of an important division among the Big Five with respect to the interpretation of the Yalta formula. The Soviet delegation considered as procedural only certain questions enumerated in the Charter in the section dealing with procedure in the Security Council; it urged that all other questions be considered as subject to the unanimity rule. The other four Big Powers desired to leave the door open for the consideration of other questions as procedural and in consequence not subject to "veto." In particular, they insisted that no permanent member of the Security Council should be able to prevent the first steps in the procedure of pacific settlement of disputes; namely, the consideration and discussion by the Council of any matter brought to its attention by a state, as well as the granting by the Council of a hearing to the parties to a dispute. As these steps did not involve any action by the Security Council, and as the Council did not need to take sides at this preliminary stage, it has been thought that these matters were outside of the chain of events which might later on lead to sanctions and that for that reason the rule of unanimity need not apply to them.

The Soviet delegation refused, however, to accept this interpretation. Only after the matter was referred through Harry Hopkins to Marshal Stalin was the deadlock solved. But the other powers were obliged to pay for this concession by an agreement that any decision regarding the preliminary question whether a matter is procedural or not must be taken by a vote of seven, including the concurring votes of the permanent members. All these agreed interpretations of the Yalta formula were then put together in a statement of June 7, 1945, and were presented on a "take-it-or-we-will-have-no-Charter" basis to the smaller states. These states were obliged to accept the statement, but in a last gesture of defiance they refused to "approve" it and agreed merely to its incorporation in the records of the Conference as a unilateral statement of the five powers.

The Record as to the "Sparing" Use of the "Veto"

During the debate on the Australian amendment, the five powers promised that the veto would be used sparingly. At the time of this writing (October 3, 1947), twenty-three vetoes have been cast in the Security Council: twenty-one of them were cast by the Soviet Union, one was cast by France (in the Indonesian case), and on one occasion France and the Soviet Union jointly blocked a decision in the Spanish case that a certain question was a procedural one. Ten of the Soviet "solo vetoes" related to applications for membership in the United Nations, six related to Greece, three to Spain, one to Syria and Lebanon, and one to the Corfu Channel incident. In two cases the Soviet Union has cast a "double veto"; i.e. a set of two vetoes, one of which prevented a decision from being considered procedural and thus validated the other veto on the main decision. To aggravate the situation, in two cases—Syrian-Lebanese and Spanish—the Soviet Union has cast vetoes out of sheer contrariness only because she considered the resolutions under discussion too mild. In one of these cases—the Syrian-Lebanese one—the parties concerned (France and Great Britain) went ahead and agreed to fulfill the decision of the Security Council as if it were not invalidated by the Soviet veto.

When the General Assembly met at Flushing Meadows at the end of 1946, the small states immediately raised the question of the abuse of the veto; and only a joint effort by the five principal powers prevented the Assembly from adopting a strong resolution condemning the behavior of the Soviet Union. The five powers promised to behave better, and the Assembly limited itself to an exhortation that the permanent members of the Security Council make every effort "to ensure that the use of the special voting privilege of its per-

manent members does not impede the Security Council in reaching decisions promptly." Following this resolution, no veto was cast for three months; and the permanent members developed a practice of abstaining from voting instead of vetoing. Though the Charter requires "concurring votes of the permanent members", not merely a lack of negative votes, and though during the San Francisco debates abstention and absence were regarded as equivalents of negative votes, this solution was employed in a large number of instances. But fifteen new vetoes were cast again from March to October of 1947.

The United States Aligned With Opponents of the "Veto"

The whole question was consequently reopened at the second regular meeting of the General Assembly in September. The new attack was not limited to small states. This time the United States was prepared to side with the opponents of the veto. In his speech to the General Assembly on September 17, Secretary of State Marshall announced that:

> In the past the United States has been reluctant to encourage proposals for changes in the system of voting in the Security Council. Having accepted the Charter provisions on this subject and having joined with other permanent members at San Francisco in a statement of general attitude toward the question of permanent-member unanimity, we wished to permit full opportunity for practical testing. We were always fully aware that the successful operation of the rule of unanimity would require the exercise of restraint by the permanent members, and we so expressed ourselves at San Francisco.
>
> It is our hope that, despite our experience to date, such restraint will be practiced in the future by the permanent members. The abuse of the right of unanimity has prevented the Security Council from fulfilling its true functions. That has been especially true in cases arising under Chapter VI and in the admission of new members.
>
> The Government of the United States has come to the conclusion that the only practicable method for improving this situation is a liberalization of the voting procedure in the Council.
>
> The United States would be willing to accept, by whatever means may be appropriate, the elimination of the unanimity requirement with respect to matters arising under Chapter VI of the Charter, and such matters as applications for membership.
>
> We recognize that this is a matter of significance and complexity for the United Nations. We consider that the problem of how to achieve the objective of liberalization of the Security Council voting procedure deserves careful study. Consequently, we shall propose that this matter be referred to a special committee for study and report to the next session of the Assembly. Measures should be pressed concurrently in the Security Council to bring about improvements within the existing provisions of the Charter, through amendments to the rules of procedure or other feasible means.

American Position as to What Should Be Immune from "Veto"

Three days later, the American representative to the United Nations, former Senator Warren R. Austin, of Vermont, restated this objective as follows:

> We favor use of the rule of unanimity only for the purpose intended. Such use can be defined more precisely than it has been. If world opinion is convinced and determined that all issues being considered under the pacific settlements provision of Chapter VI, and such matters as applications for membership in the United Nations should be immune from the veto, I believe these objectives could be reached. This would comprehend such functions of Chapter VI as negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement and the like.
>
> The United States is not wedded to any particular method or to any timetable in the pursuit of our objective to increase the effectiveness of the Security Council. It is my hope that the Security Council itself will develop its own rules and practice in a way that will contribute substantially toward this goal.
>
> Many questions which have been regarded as substantive could be classified as procedural and not subject to veto by the adoption of an appropriate rule with the concurrence of the permanent members.
>
> It is our desire to extend a most thorough and searching examination into all the aspects of this question. We, therefore, have proposed that the Assembly establish a committee to study the entire issue and make suitable recommendations to the next session. Moral energy generated among the peoples of all nations would promote achievement of the committee's objective.
>
> The scope of this inquiry would not now include the application of the unanimity principle to the enforcement provisions—rupture of diplomatic relations, economic sanctions, or use of force—which are found in Chapter VII of the Charter.

At the same time, an oblique attack on the veto was made by the United States in the Security Council itself, where a triple proposal was made to extend the realm of procedural matters in numerous respects, and particularly to make it clear that there is no veto on the determination of the question of which states are parties to a dispute, and to regularize the practice that an abstention is not a veto. (U.N. Doc. S/C. 1/160).

Efforts to Strengthen Assembly and Create a "Little Assembly"

The United States has also joined the small states in their effort to increase the stature of the General Assembly. The good influence that the Assembly may exert on the peaceful settlement of disputes has been hampered in the past by the fact that the Assembly is in session only once a year and that no committee of the Assembly had the power to do the spadework for the Assembly between sessions. To improve that situation and strengthen the hand of the "vetoless" Assembly, Secretary of State Marshall—following a proposal made by the Netherlands on October 5, 1945 (U.N. Doc. PC/EX/A/40)—proposed on September 17 that an Interim Committee of the General Assembly be established to deal with problems which may arise between the sessions of the Assembly. As Article 22 of the Charter empowers the Assembly to "establish such subsidiary organs as it deems necessary for the performance of its functions," no amendment of the Charter is necessary to establish such a committee. The following detailed proposal for a "Little Assembly" was submitted by the United States delegation to the General Assembly on September 26:

THE GENERAL ASSEMBLY

Conscious of the responsibilities specifically conferred upon it by the Charter in relation to the maintenance of international peace and security (Article 11), the promotion of international cooperation in the political field (Article 13), peaceful adjustment of any matters likely to impair the general welfare and friendly relations among nations (Article 14);

Deeming it necessary for the effective performance of these functions to establish a committee for study, inquiry and discussion on its behalf during the period between the adjournment of the present session and the convening of the next regular session of the General Assembly (Article 22);

Recognizing fully the primary responsibility of the Security Council for prompt and effective action for the maintenance of international peace and security (Article 24);

RESOLVES THAT

(1) An interim committee is created composed of all the members of the United Nations, each member to have one representative;

(2) The interim committee shall assist the General Assembly by performing the following duties and functions:

(A) To consider, as it may determine, such situations as may come to its attention within the purview of Article 14, or such questions as are brought before the General Assembly by the Security Council pursuant to Article 11 (2), and to report thereon, with its recommendations to the General Assembly;

(B) To consider and to make recommendations to the General Assembly upon general principles of cooperation in the maintenance of international peace and security under Article 11 (1) and to initiate studies and make recommendations for the purpose of promoting international cooperation in the political field under Article 13 (1) (A);

(C) To consider whether occasion may require the calling of a special session of the General Assembly and, if it deems that such session is required, to so advise the Secretary General.

(D) To conduct investigations and appoint commissions of inquiry within the scope of its duties and functions as it may deem useful and necessary.

(E) To study, report and recommend to the third regular session of the General Assembly on the advisability of establishing a committee of the General Assembly on a permanent basis to perform the duties and functions of the interim committee with any changes considered desirable in the light of its experience.

(F) To perform such other functions and duties as the General Assembly may assign to it.

(3) In discharging its duties and functions, the interim committee shall at all times take cognizance of the responsibilities of the Security Council under the Charter for the maintenance of international peace and security, and it shall also take duly into account the duties and functions assigned by the General Assembly or by the Security Council to any committee or commission, such as the Atomic Energy Commission and the Commission for Conventional Armaments.

(4) The provisional rules of procedure of the General Assembly shall, so far as applicable, govern the proceeding of the interim committee and such subcommittees and commissions as it may set up. The interim committee shall elect its chairman, vice chairman, rapporteur and such other officers as it may deem necessary. The interim committee shall be convened by the Secretary General within fifteen days following the close of the second regular session of the General Assembly, and it shall continue to serve until the beginning of the third regular session of the General Assembly.

(5) The Secretary General shall enter into suitable arrangements with the appropriate authorities of any member state in whose territory the interim committee or its subcommittees or commissions may wish to sit or to travel. He shall provide necessary facilities and assign appropriate staff as required for the work of the interim committee, its subcommittees and commissions.

Treaty of Rio de Janeiro Opens Avenues of Approach

As pointed out by our Association's Committee on September 17 and by the Resolutions adopted by the House of Delegates on September 24 (elsewhere in this issue), another avenue of approach was opened by the Rio de Janeiro Treaty of September 2, 1947 (published in our October issue, page 1058). Under Article 51 of the Charter, the Members of the United Nations may conclude among themselves agreements providing for "collective self-defense" in case of an armed attack against any one of them, and defining in advance cases of "aggression" in which the obligations under these agreements will apply. There is no territorial limitation on that inherent right of self-defense and no propinquity is required. In consequence, states from all over the world may join in such an undertaking. It might have been possible, for instance, to provide in the Rio Treaty itself for accession of non-American states provided that in each individual case the original parties to the Treaty have agreed to it. Similar agreements may be concluded also by states in other regions and among states belonging to different regions. One could go even further and—as has been suggested in the *New York Times Magazine* of September 11, 1947 by Hamilton Fish Armstrong—a supplementary protocol to the Charter could be adopted binding the signatory states to come to the rescue in case of an armed attack. Such a protocol could be open to all and it could be approved by the General Assembly under its general authority to make recommendations to the Member Nations with respect to "the general principles of cooperation in the maintenance of peace and security" (Article 11 of the Charter). Like the Treaty of Rio de Janeiro, such a protocol might provide for a two-thirds vote, with no "veto" power vested in any Nation.

A further link between the special protocol and the United Nations may be provided for if the "Little Assembly" is established. The draftsmen of the Rio Treaty found it necessary to confer the power of decision on an organ of consultation, a meeting of the Ministers of Foreign Affairs of the signatory states; and the Governing Board of the Pan American Union was authorized to act provisionally as an organ of liaison and consultation until that meeting takes place. Similarly, a supplementary protocol to the Charter might confer on the General Assembly some of the powers to be performed under the Rio Treaty by a meeting of foreign ministers, and it might confer on the "Little Assembly" some of such powers as are vested in the Governing Board of the Pan American Union.

Potential Usefulness of the General Assembly for Peace and Law

While neither the General Assembly nor any body established by it could order action by the organization (Article 11, #2, of the Charter), it has the power to "discuss any questions relating to the maintenance of international peace and security" and to "make recommendations with regard to any such questions to the state or states concerned." The General Assembly, or provisionally the "Little Assembly," may in a case of an armed attack consider the situation and determine by a two-thirds vote the mere fact of who should be considered aggressor; and it may notify all the signatories of the protocol that they will be justified in resorting to Article 51. Following such a statement by the General Assembly or the "Little Assembly," the delegates to the Assembly representing the signatories to the protocol may proceed to organize a special *ad hoc* committee to deal with the situation and to decide upon the measures to be taken.

Of course, any such action would have to be in conformity with Article 51 of the Charter and all the measures taken should be immediately reported to the Security Council which might supersede them by its own measures. But if the exercise of the veto power by a permanent member hampers the action of the Security Council, an alternative will be provided for, an orderly procedure determined in advance and not simply improvised at the moment of emergency. A method will be thus established to bring into focus the pressure of public opinion, and all the steps taken will have the moral backing of at least two-thirds of the peoples of the world represented in the General Assembly.

Another suggestion for potential emergency, which is being considered at Lake Success (New York *Times*, October 6, 1947) is that which was broached by Thomas Raeburn White and William L. Ransom in the August JOURNAL (page 756) and is implicit in the Resolutions adopted by the House of Delegates on September 22 as embodying a course of action for the amendment of the Charter which the law-abiding Nations could take to fulfill wishes of the majority.

While it must be recognized that no mechanical and technical devices can by themselves ensure peace and the submission of the Nations to the rule of law, any real increase in the capacity of the world organization to cope with aggression makes the chances of a would-be aggressor comparatively smaller and may upset his calculations enough to lead him to the abandonment of his plans for world domination.

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Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Mark H. Johnson, Committee Chairman.

Meeting of the Section of Taxation

■ If you did not attend sessions of the Section of Taxation in Cleveland, you missed something that would have helped you in your work for clients. Many important problems were considered, and the votes on some controversial issues were very close. The sessions were well attended, and the results almost certainly reflect a cross-section of informed opinion from coast to coast. The success of the meeting was in large part due to the increased activity of the various Section committees throughout the year, and to the continuous cooperation of lawyers in analyzing present defects in the tax structure and suggesting improvements. The officers and Council of the Section are looking forward to even more intensive activity during the year ahead. Every member of the Section is earnestly invited to participate in this work. If you have not yet volunteered, please write to the chairman of the Section, William A. Sutherland, Ring Building, Washington 6, D. C.

Family Income and Estates—Equalization Between Community Property and Common Law States

One of the most important accomplishments of the meeting was the unanimous approval of the final report of the Committee on Equalization of Taxes in Community Property and Common Law States, under the chairmanship of Allan H. W. Higgins. At the 1946 meeting the Section endorsed the so-called "Surrey Plan" for automatic division of husband-wife income in all states, as the most practical and equitable method of creating uniformity in income taxation. At the same meeting it was recognized that the 1942 estate and gift tax amendments unfairly affected residents of the community property states, and the committee was instructed to devise a program which would equalize these taxes. The committee recommended a statute which would apply in both jurisdictions, whereby either spouse may leave to the survivor up to one-half of his estate (including the survivor's share of community property) free of estate tax, provided that the property so left would be subject

to estate tax in the survivor's estate. Similarly, one-half of the amount of any gifts by one spouse to the other are to be exempt from gift tax, and gifts to a third party may be reported on a joint gift tax return. The unanimous agreement of the Committee members from both the community property and common law states is an assurance of the equal application of the proposed statute.

Family Partnerships

In one of the liveliest sessions of the meeting, the Section adopted the recommendation of the Committee on Taxation of Partnerships that donated partnership interests be recognized for income tax purposes, and approved the proposed safeguards against unwarranted deflection of the donor's income. The Section refused to make any recommendation, however, as to the effective date of the proposed amendment.

Pensions and Earned Income

Another subject of great interest was the question of pension plans for partners and self-employed persons. The Committee on Federal Income Taxes recommended a variation of the "Silverson Plan" for exemption of a percentage of earned income which the taxpayer invests in government bonds. Mr. Silverson explained that the primary purpose of his plan was to ameliorate the tax disadvantages which self-employed professionals incur, on the one hand in contrast to the business man who can build up an estate in his business, and on the other hand in contrast to corporate employees who can obtain pension trust benefits. After spirited debate, it was resolved that no immediate Section action be taken, but that a special committee be appointed to make an intensive study of the problem and to report to the Council at the earliest possible moment.

Correlation of Income, Estate and Gift Taxes

Under the sponsorship of Professor Warren's Committee on Correlation of Federal Income, Estate and Gift Taxes, there was an explanation and discussion of the "integration and correlation" statute recommended by the Advisory Committee on Estate and Gift Taxation. The discussion was led by Dean Griswold and other members of the Advisory Committee who were present.

State and Local Taxation

The semi-autonomous Committee on State and Local Taxes held three separate sessions of its own, each dealing with a separate phase of local tax problems. This innovation was very successful. The sessions were under the direction of Chairman Richard C. Beckett and Vice Chairmen George D. Brabson and Robert C. Brown. At the first session, Hugh S. Jenkins, Attorney General of Ohio, spoke on the subject of new taxes for municipalities. At the second, there was a discussion, led by Clarence D. Laylin and J. V. Morgan, on rights and remedies of taxpayers to correct assessments. At the third, William C. Warren and John W. Lapsley discussed the current impass on the problem of sales and use taxes. Open forums at all of the sessions provided interesting general discussions.

Social Security Legislation

Under the chairmanship of Bryan C. S. Elliott, the Committee on Old Age Benefits and Unemployment Insurance Taxes cooperated with the Committee on Employment and Social Security of the Association in sponsoring a very successful luncheon at which the proposed "cradle to the grave" Social Security amendments were debated by Wilbur J. Cohen, technical adviser to the Commissioner of Internal Revenue, and Paul J. Daugherty, director of the Social Security Department of the Ohio Chamber of Commerce.

Handy Booklet On New Insurance Laws

■ An ingeniously self-indexing booklet, now being distributed to members of the Section of Insurance Law, summarizes the extensive 1947 statutory developments resulting from the Supreme Court's decision in *U. S.* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 88 L. ed. 1440.

Chairman Tom Watters of the Section asks the JOURNAL to say that a limited supply of copies is available without charge to those who are not members of the Section. Requests for a copy should be sent to Association Headquarters in Chicago or to John V. Bloys, 165 Broadway, New York 6, New York, who is chairman of the Section's special Committee under whose auspices the report was prepared.

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Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*"The Administrative Power of Investigation":* Professor Kenneth Kulp Davis, of the University of Texas Law School, writes the leading article in the August number of the *Yale Law Journal* (Vol. 56, No. 7; pages 1111-1154). It contains a detailed analysis of the Supreme Court decisions which have extended the power of Congress to delegate to administrative bodies the authority to conduct investigations under specialized situations and refers particularly to the numerous federal statutes recently enacted which contemplate the use of the investigatory powers of the administrative agency. The author recognizes that the broad extension of authority of governmental agencies of all kinds involves an increasing burden to the regulated business but considers that the extension of administrative investigations is an unavoidable concomitant of industrialization. (Address: Yale Law Journal, Yale Station, New Haven, Conn.; price for a single copy: $1).

CONSTITUTIONAL LAW—*"A Study on the Unconstitutionality of the Proposed Federal Abolition of the Poll Tax":* In the August number of the *Georgia Bar Journal* (Vol. X, No. 1; pages 37-42), Howard Newcomb Morse, of the Augusta Bar, Secretary and Treasurer of the Augusta Circuit Bar Association, (Richmond, Columbia and Burke Counties), and a member of our Association, writes trenchantly on the above quoted subject. His thesis is that the original thirteen States came into the Union on specified terms of equality and right to determine for themselves who shall be permitted the privilege of voting, that the other thirty-five States were admitted on conditions of equality with the original thirteen, and that the basic concepts of the federal Union and the powers of the States would be violated by a federal law against the poll tax. (Address: Georgia Bar Journal, Persons Building, Macon, Ga.; price for a single copy: not given).

CORPORATIONS—*"The Relation of Depreciation to the Determination of Surplus and Earnings Available for Dividends":* A thoughtful discussion of the relation of depreciation to the declaration and payment of dividends, by E. Grant Fitts, of the Alabama Bar, is in the September issue of the *Virginia Law Review* (Vol. 33, No. 5; pages 581-610). The article not only traces the historical development of the limited extent to which it has been necessary thus far to give recognition to depreciation in determining the availability of surplus for dividends, but also considers current tendencies in statutory developments and administrative rulings to place greater emphasis upon depreciation. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1).

EVIDENCE—*"The Law of Wire Tapping":* The first installment of a study on the admissibility of evidence obtained by wire-tapping was in the June issue of the *Cornell Law Quarterly* (Vol. XXXII, No. 4; pages 514-555). After extended reference to the controversial development and arguments concerning the admissibility of evidence obtained in violation of the right guaranteed by the Fourth Amendment of the Constitution of the United States and by the Constitutions of all States against unreasonable searches and seizures, "a controversy to which the law of wire-tapping is heir," the author, Margaret Lybolt Rosenzweig, discusses the history of the federal law of wire-tapping as developed by the federal statutes and Court decisions. She points out that the history of the admissibility of evidence received directly or indirectly through wire-tapping is divided into two stages. During the first stage (1928-1937), such evidence was admissible because the Supreme Court in *Olmstead* v. *U. S.* held that such evidence was not secured in contravention of the Fourth Amendment because wire-tapping is not a "search" or a "seizure" within the meaning of the Amendment. The second stage (1937 to date) deals with the admissibility under the Federal Communications Act. The article concludes by presenting a clear and helpful analysis of the leading federal decisions interpreting Section 605 of that Act, which refers to the "unauthorized publication or use of communication" transmitted or received by wire or radio. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1).

INTERNATIONAL LAW—*"The Nuernberg Verdict":* To the still-growing mass of material as to the

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

establishment of an international tribunal for the trial of war criminals, Harold Levanthal, Sam Harris, John M. Woolsey, Jr. and Warren F. Farr contribute an interesting chapter in the July issue of the *Harvard Law Review* (Vol. LX, No. 6; pages 857-907), estimating the work of the International Military Tribunal in terms of the record of the trial and the verdict rendered. Discussing the limitations and standards set by the Tribunal as to the scope of its jurisdiction and the tests to be applied in determining guilt, the authors give the greatest attention to Count One—the conspiracy count. The prosecution under this count set in large measure the pattern to be followed under the other counts. The restricted interpretation of a common plan under Count One, not only made more difficult the prosecution's problem of proof, but also had the effect of weakening the case under the other counts. The authors conclude that a critical reading of the opinion indicates that the Tribunal primarily stressed the defendants' implication in War Crimes —the one offense universally recognized in earlier years. In future trials for Crimes against Peace, the prosecution would be considerably handicapped if confined to the limits set here, and the difficulties of proof would be even greater, in view of the fact that future war planners would be forewarned in the matter of keeping their records circumspect. (Address: Harvard Law Review, Cambridge, Mass.; price for a single copy: $1).

LABOR RELATIONS LAW–*"Constitutionality of the Portal-to-Portal Act" of 1947:* The leading "note" in the September number of the *Columbia Law Review* (Vol. 47, No. 6; pages 1010-1026) argues at length, and concludes that the Portal-to-Portal Act should be held by the Supreme Court to be unconstitutional as attempting a retroactive destruction of a statutory liability (under the Fair Labor Standards Act). Several Circuit and District Judges are reported to have expressed a similar view orally from the bench. Lawyers who have occasion to advise clients on questions affected by the Portal-to-Portal Act will be prudent if they obtain and examine this "note". (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

LABOR LAW–*"The 'Run-Off' Election Under the Wagner Act–A Review and a Proposal":* Section 19 (c) (3) of the Taft-Hartley Act and Section 203.62 of the NLRB Rules and Regulations effective August 22, 1947, prescribe a "run-off" between the two highest choices when the original election involves more than two choices and no one choice obtains a majority of the votes cast. An article in the June issue of the *Cornell Law Quarterly* (Vol. XXXII, No. 4; pages 490-513), by Bertram F. Willcox, Associate Professor of Law at the Cornell University Law School, and Stanley M. Levy, a third-year student in the Law School, traces the historic development of the method of the "run-off" election prescribed by the 1947 Labor Law as corrective for previous NLRB rulings, demonstrates what are regarded as its shortcomings, and presents by way of substitution a method of voting for a second-choice, which could be utilized to determine the result if no first-choice selection wins.

The method advocated by the authors will be recognized as a simplification of the proportional representation device used in some political elections and now much in controversy in New York City and elsewhere. The article demonstrates advantages for the suggested method, which in its application to NLRB elections is not regarded as open to the objections often urged against the election of legislators by PR. The present statutory method is looked on by the authors as often disenfranchising the voter who prefers to have no union at all on the premises if his own is not to be selected; the authors urge that their method would avoid so undemocratic a result. They point out also that it would eliminate the need for the run-off election in many cases, thus saving time and expense and avoiding delay.

When the Congress and its new Joint Committee on Labor-Management Relations, which met for the first time in October, gets around to examine the operation of the Taft-Hartley Law, the statutory method prescribed for NLRB "run-off" election will doubtless be one of the matters that receives consideration. Without passing here on the merits of these writers' well-considered criticisms and remedial substitute, we note this article as deserving consideration by all those who seek further improvement of the new law. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1).

REAL PROPERTY–*Actions to Quiet Title–"Problems and Procedure in Quiet Title Actions":* The vexing problems arising in and out of actions to quiet title to real property are the subject of a comprehensive article by William F. Finnegan, Jr., of the Minnesota Bar, in the *Nebraska Law Review* for May (Vol. XXVI, No. 4; pages 485-533). After a brief historical outline of former suits in equity in the nature of bills of peace and bills *quia timet,* the author discusses actions to quiet title under the statutes of Nebraska. While the discussion is directed primarily to members of the Nebraska Bar, the problems presented are encountered everywhere; and the author's observations may be found helpful to those concerned with the difficult and often precarious task of establishing a clear title to real property. (Address: Nebraska Law Review, Lincoln 1, Neb.; price for a single copy: $1).

STATE LEGISLATION–*Indiana –North Carolina:* The leading article in the June issue of the *North Carolina Law Review* (Vol. 25, No. 4; pages 376-478) is a careful survey of the more important statutory

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changes made by the 1947 General Assembly of North Carolina, prepared by members of the faculty of the Law School of the University of North Carolina. A discussion of the enactments of the 1947 sessions of the Indiana General Assembly, including the controversial "anti-hate" bill, is in the July issue of the *Indiana Law Journal* (Vol. 22, No. 4; pages 293-416). While these articles may be of particular value to lawyers engaged in practice in North Carolina or Indiana, they will be interesting to lawyers in other States if they become concerned with recent trends in legislation. (Addresses: North Carolina Law Review, School of Law, Chapel Hill, N. C.; price for a single copy: 80 cents. Indiana Law Journal, 38 Maxwell Hall, Bloomington, Ind.; price for a single copy: $1).

TAXATION—*Federal Income Taxes—"Practice Before Field Offices of the Bureau of Internal Revenue":* In the May issue of the *Wisconsin Law Review* (Vol. 1947, No. 3; pages 307-320), John S. Best, of the Wisconsin Bar, contributes an article which succinctly reviews and comments upon the Bureau's practice requirements, from the recognition of attorneys, through the various states of negotiation, to the ultimate settlement (or, unhappily, failure to agree upon administrative disposition of the matter). He points out that the tremendous growth in numbers of taxpayers and the sharp rises in rates have resulted in greatly increased numbers of contested tax returns. Precisely because of this, many a general practitioner who is not experienced in federal tax matters finds his practice expanding into this field. Such will undoubtedly find this article a helpful start toward orienting themselves in the procedural matters affecting their problems. (Address: Wisconsin Law Review, Madison, Wis.; price for a single copy: 75 cents).

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OUR YOUNGER LAWYERS

Eugene C. Gerhart, Editor-in-Charge
T. Julian Skinner, Jr., Chairman, Jasper, Alabama
Walter B. Keaton, Vice Chairman, Rushville, Indiana
Charles H. Burton, Secretary, Washington, D. C.

■ The Fourteenth Annual Meeting of the Junior Bar Conference was held at the Hollenden Hotel, Cleveland, Ohio, from September 20 through September 23. This meeting was not only the largest post-war meeting, but more members were registered than at any other meeting in the history of the Conference.

T. Julian Skinner, Jr., of Jasper, Alabama, was elected National Chairman at the final general session of the Annual Meeting on September 23. Walter B. Keaton, Rushville, Indiana, was elected National Vice Chairman and Charles H. Burton, Washington, D. C., was elected National Secretary. All of the new officers have had wide experience in Junior Bar Conference activities. Julian Skinner, a partner in the firm of Bankhead, Skinner and Kilgore, in Jasper, has served as National Vice Chairman, National Secretary, and on the Executive Council from the Fifth Circuit.

Walter Keaton, in addition to effective work on a number of special committees, has served as a member on the Executive Council from the Seventh Circuit. Charles Burton, since his release from the Navy, has been the Editor of *The Young Lawyer* for the past two years. His work in that capacity qualifies him well for his duties as our new secretary. He is also a member of the Advisory Board of the JOURNAL.

Elected to fill vacancies on the National Executive Council were Stanley M. Brown, of Manchester, New Hampshire, First Circuit; Thomas Cooch, of Wilmington, Delaware, Third Circuit; Randolph W. Thrower, of Atlanta, Georgia, Fifth Circuit; George E. Frederick, of Milwaukee, Wisconsin, Seventh Circuit; Cameron W. Cecil, of Los Angeles, California, Ninth Circuit, and Thomas M. Raysor, of the District of Columbia.

T. JULIAN SKINNER, Jr.

Former Governors McNutt and Stassen Speak

Addresses by Paul V. McNutt, former High Commissioner of the Philippine Islands, member of our Association since 1920, and Harold E. Stassen, former Governor of Minnesota, member of our Association

since 1934 and also originally one of the early members of the Junior Bar, highlighted Cleveland sessions of the Conference. Mr. McNutt gave a picture of troubling conditions in Europe, and warned that dire results may follow unless the principles of the Marshall Plan are effectively and promptly initiated. At a joint luncheon of the Conference and the Section of International and Comparative Law, Governor Stassen also discussed the international situation and particularly the principles of the Marshall Plan. Both addresses received Nationwide attention in the press.

Breakfast Meeting on Broader Relationships

At the annual breakfast meeting, Sunday morning, a forward step in inter-Bar Association relationships was taken when E. B. Griffith, of Toronto, Ontario, Chairman of the Junior Bar Section of the Canadian Bar Association, was our guest. He spoke briefly on the work of the Canadian organization and compared it with activities of the Junior Bar Conference. Hunter Gehlback, of Chicago, a Vice President of the United States Junior Chamber of Commerce, spoke on the activities of that organization and advocated more cooperation between that group and Bar groups throughout the Nation. Robert C. Bell, Jr., of Stamford, Connecticut, spoke on the problems facing Junior Bar groups in the New England area. James E. Burns, of San Francisco, California, explained the activities of the Barristers Club of San Francisco. Bernard W. Chill, of Jackson, Mississippi, reported on the Jackson Law Institute, and Frederick L. Hall, of Dodge City, Kansas, made helpful observations as to the rejuvenation of dormant Junior Bar groups.

Law Student Problems

At the Tuesday morning general session of the Conference Robert G. Storey, of the Texas Bar (Dallas), a practicing lawyer who is also the Dean of the Southern Methodist University Law School, spoke on practical aspects of legal education. He recommended the establishment of a modern law center where research, free legal aid clinics, conferences and seminars in international law and international relations, etc., can be effectively coordinated. Specifically, he recommended to the Conference the following immediate action:

1. Continuing efforts in relation to law student Bar organizations.
2. Comprehensive study of the practical aspects of law schools.
3. Cooperation with the Committee on Continuing Education of the Bar.
4. Cooperation with legal centers and foundations.

House Action on Changes in Conference By-Laws Deferred

The National Conference, following a report of its Special By-Laws Committee, approved changes in the by-laws of the Conference which would place the terms of office on a calendar year basis instead of an Association year basis (i.e. from the adjournment of one Annual Meeting to the adjournment of the next one) as heretofore. A change was also approved providing for affiliation of law school organizations with the Junior Bar Conference and for a reduction in the dues for newly admitted members of the Bar for the first two years following their admission. Because of the congestion of the Calendar of the House of Delegates, these recommended changes in the Conference by-laws will not be acted on until the mid-winter meeting of the House of Delegates in February, when the recommendations of the Board of Governors as to the changes will also be submitted.

Awards of Merit in Bar Association Work Are Announced

The Award of Merit for groups affiliated with the Junior Bar Conference for general excellence in Bar Association activities on a State-wide basis was made to the Massachusetts Junior Bar group. Among their outstanding accomplishments was the establishment of a radio program in cooperation with the Yankee Network Institute, with a network tie-in of some thirteen stations throughout New England.

The Award of Merit for general excellence for local groups was won for the third consecutive year by the Junior Bar Association of the Milwaukee Bar Association.

Special awards consisting of gold watches, offered by National Director W. Carloss Morris, Jr., were made to J. Evelyn Pitschke, Indianapolis, Indiana, for the outstanding State-wide Public Information Program, and to C. Willard Max of St. Louis, Missouri, for the outstanding city Public Information Program.

To our retiring Chairman, "Jimmie" Fellers, of Oklahoma, and our indefatigable retiring secretary, "Bill" Eddleman, of Washington State, and their associates, members of the Conference express their thanks for much work well done!

(Continued from page 1127)
law library in his region and by public libraries, and college and public school libraries as well. The prestige of the profession is enhanced if non-lawyers see its magazine regularly on the periodical shelves or racks in community libraries.

The obtaining of additional non-member subscribers was favored. Several members of the Advisory Board reported that they obtain additional copies, or unused copies from others in their offices, and send them to newspaper editors with personal letters calling attention to a particular article or two and suggesting editorial comment on it. The JOURNAL will never accomplish all it can and should for our profession until its contents come regularly and extensively to the attention of non-lawyers.

* * * * *

Surprising angles develop as to the circulation (or non-circulation) of the JOURNAL as a consequence of membership in our Association. For many years the JOURNAL has been publishing great quantities of material in support of improvements in the administration of justice and in advocacy of higher salaries and security of tenure for judges, as well as articles helpful to judges and lawyers in their daily work. Nevertheless, a State Delegate reported in Cleveland that he had found that no judge in the highest Court of law in his State was a member of our Association. He went to work and changed this situation substantially. Hundreds of federal and State Court judges are not members of our Association. You may find non-members among the judges in your own State and locality.

* * * * *

Nearly four hundred lawyers were at luncheon in the Lawyers' Club of New York on October 16, "in recognition of a notable event"—the appointment and confirmation of Harold R. Medina, the President of the Club, as a United States District Judge for the Southern District of New York. Senior District Judge John R. Knox told of his perturbation, month after month, that the vacancy was not filled as the Court so greatly needed, and his fear that he would have "a personable but inexperienced political lawyer as an associate". Then the organized Bar, spear-headed by the Association of the Bar of the City of New York and supported fully by the State Bar Association and the American Bar Association, went into action. Judge Knox said that as a result it was "comforting to know" that the great powers of the Court in the Southern District "have been committed to hands that are competent, to a mind that is trained, to a heart that is brave, and to a man of high integrity". For this "commendable and patriotic action" of the President of the United States and "for the public service rendered by the men who induced him to act as he did, I register my thanks and express my gratitude." Judge Knox added that "each of you, along with every man and woman who believes in the sanctity and competency of the judicial establishment, should do likewise".

* * * * *

It was all very heartening to those who watched last year the beginnings of our Association's efforts to be of assistance to the President and the Attorney General, and to the Senate and its Committee on the Judiciary, as to selections for federal judicial office. The appointment of Judge Medina was the first, and thus far the only, instance in which the organized Bar has brought forward the name of a highly experienced and independent lawyer as an alternative to a personable recommendation of political organizations. That course is not likely to be followed in many instances. The function of our Association is to obtain trustworthy information and independent judgment, chiefly from State and local Bar Association sources, and make them available to the appointing and confirming powers. There is no desire, and there can be no danger, that the Bar Associations will try to dictate the selection of judges. On the contrary, the President, the Committee on the Judiciary, and the Senate itself, have properly acted on their own responsibilities, at times contrarily to the recommendations of our Association's Committee (see 33 A.B.A.J. 895; September, 1947). This is as it should be and will continue to be. But their action was taken with information and opinion gathered by our Association before them. Few would question that, on the whole, the intervention of the organized Bar has thus far tended to bring about the nomination and confirmation of judges of better experience, temperament, and freedom from political obligations, than would have been secured without it. In Cleveland, Chairman Alexander Wiley, of the Senate Committee on the Judiciary, was outspoken in his acknowledgment of indebtedness to the Association's Committee and the JOURNAL for information and opinion as to nominations for the bench. The decisive but as yet unanswered question is, we think, this: Can our Association's Committee and the corresponding committees of State and local Bar Associations be so coordinated that the knowledgment and judgment of lawyers in the localities can be dependably assembled, analyzed and made available in time? The function is not one which can be fulfilled acceptably at the top level only; the trustworthy information and judgment will have to come from the rank and file of the profession, through the local and State Bar Associations, up to our Association's Committee.

* * * * *

Our next issue will contain, as is usual for December, comprehensive indices of the contents of the JOURNAL during 1947. Such a means of reference back to the year's work and to the useful material published will be valued by many of our readers. An increasing num-

ber of them are having their files of the JOURNAL bound up in a permanent form convenient for reference. The JOURNAL sells binders, at a comparatively low cost; but a better product can generally be obtained by consulting your book bindery.

* * * * *

In Cleveland during the Annual Meeting, the National Conference Group, representing the American Bankers Association's Trust Division and the American Bar Association through its Committee on Unauthorized Practice of the Law, formulated and issued a notable historical statement and re-publication of the declarations of principles by the Group in 1940 and 1941 (See 26 A.B.A.J. 834 and 27 A.B.A.J. 802). This material is about to be published in the *Trust Bulletin,* the official publication of the Trust Division of the American Bankers Association, and will also be sent to every known corporate fiduciary in the United States, so as to bring these principles afresh to those who act for fiduciaries. The material is received by the JOURNAL too late for the inclusion of any of it in this issue; but at first opportunity, despite our limited space, we shall bring at least the most important parts of it again to the attention of our readers, to the end that the Bar may cooperate fully with the fiduciaries in giving practical effect to the agreed-on principles and policy.

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Letters to the Editors

Judge McColloch Replies to Charles P. Curtis, Jr.

To the Editors:

I do not understand Mr. Curtis (your October issue, page 1052).

The defendants in the *Yakus* case wanted to show to the Court and jury that the regulation under which they were being prosecuted was arbitrary, capricious and therefore unconstitutional. They were told they could only show that before the Emergency Court of Appeals. Was that giving them a trial in Massachusetts?

Justice Rutledge (dissenting) had hold of the point (321 U. S. 480), but he failed to get the attention of the Court.

Mr. Curtis argues that because the Sixth Amendment was found inapplicable, the defendants were deprived of the benefit of Article III, Section 2, Clause 3.

This is strange argument, in view of the well-known historical fact that the Amendments were intended to provide *additional* guarantees to those provided in the body of the Constitution. Mr. Curtis would now have the Amendments shrink the guarantees contained in the original text!

Why not admit that Article III, Section 2, Clause 3, was *overlooked,* instead of seeking to perpetuate as an authority this incorrect and highly dangerous precedent, plainly the product of wartime conditions?

CLAUDE MCCOLLOCH

United States District Court
Portland, Oregon

Editor's Note: In our July issue (page 673), our sketch of Senior Circuit Judge Calvert Magruder of the First Circuit referred to his opinion in *Rottenberg* v. *U. S.,* 137 F. (2d) 850 (affd. *sub. nom. Yakus* v. *U. S.,* 321 U. S. 414). In our October issue (page 1052), United States District Judge McColloch commented critically on the grounds of decision, and Charles P. Curtis, Jr. of Boston, took up the cudgels in reply (page 1052). Judge McColloch now makes the above terse rejoinder.

California's Rules and Practice as to Reporting Decisions

To the Editors:

My attention has been directed to an article by Francis P. Whitehair, entitled "Opinions of Courts: Fifth Circuit Acts Against Unneeded Publication", 33 A.B.A.J. 751; August, 1947. In it there appears the following statement: ". . . California [and certain other States] . . . leave the matter of selection of opinions for publication to the discretion of the Court from whence they issued or to the discretion of the Reporter with whose choice the Court must concur."

This statement is completely untrue, and the author has obviously confused California with some other jurisdiction. In this State, all opinions of the Supreme Court and District Courts of Appeal are required to be printed, with no discretion of any kind residing either in the Justices or the Reporter.

B. E. WITKIN

Reporter of Decisions,
Supreme Court of California,
San Francisco, California

[EDITOR'S NOTE: Reporter Witkin's letter was referred to Mr. Whitehair, who acknowledges his error (California Code, Section 774; Deering, 1944). California should accordingly be eliminated from the list of States which starts in the last line of the first column on page 754 of our August issue.]

Bar Association News

Richard B. Allen • Editor-in-Charge

Awards of Merit for 1946-1947 to State, Local Bar Associations

■ The annual Awards of Merit to two State Bar associations and two local Bar associations were made at an Assembly session in Cleveland on September 25. For the first time two awards were made to State associations—one to a State having less than the average population and the other to one of the larger States. Similar distinction has been made for several years between large and small local Bar associations.

The 1947 winners were:

Small local Bar Association: DES MOINES COUNTY (IOWA) BAR ASSOCIATION (Burlington—county seat.)

Large local Bar Association: CHATTANOOGA (TENNESSEE) BAR ASSOCIATION.

Small State Bar Association: DELAWARE STATE BAR ASSOCIATION.

Large State Bar Association: THE IOWA STATE BAR ASSOCIATION.

Charles O. Rundall, member of the House of Delegates and of the Council of the Section of Bar Activities which has the matter in charge, bestowed the awards. In making the presentation to the smaller local Association he noted that Des Moines county had a population of less than 40,000 persons, with forty lawyers, all of whom are members of the Association. During the past year, the local Association conducted a thirteen-weeks' radio program, held thirteen seminars on the question of the veteran and State taxation, and held more than forty-two weekly meetings, among other general activities.

Mr. Rundall cited the "remarkable crusade" in regard to "scandalous administration of divorce matters" as alone entitling the Chattanooga Association to its award. (See 33 A.B.A.J. 802; August, 1947). In addition to that work the Association maintained the "same plane of excellence as in previous years," he said.

F. M. McAULIFFE

In making the award to the Delaware State Bar Association, he pointed out that the State has a population of fewer than 300,000 persons, with 218 lawyers admitted to practice, 196 of whom belong to the Association. "With a budget of less than $5000," Mr. Rundall explained, "their activities during the past year would put many great metropolitan and other State Bar associations to shame."

The award to The Iowa State Bar Association went to an organization of 2405 dues-paying members, in a State whose lawyer population is 2600.

State Bar of California Meeting Attracts Nationwide Attention

■ Nearly 1100 California lawyers attended the annual meeting of the State Bar of California in Santa Cruz on September 9 to 13. The sessions attracted Nationwide attention because the speakers included well-known personalities of American and British law and public life. The State Bars of Oregon and Arizona sent official representatives to the meeting.

Speakers during the five-day program included Viscount Jowitt, Lord Chancellor of Great Britain; Governor Earl Warren, of California; Senator James E. Murray, of Montana; Senator Robert A. Taft, of Ohio; Congressman Charles A. Halleck, of Indiana; Congressman Ray J. Madden; Tappan Gregory, of Illinois, since elected President of the American Bar Association; Harrison Tweed, President of the American Law Institute; Charles E. Wyzanski, judge of the U. S. District Court for Massachusetts; Chief Justice Phil S. Gibson, of the California Supreme Court; Sidney P. Simpson, Chairman of the American Bar Association's Committee on Continuing Education of the Bar; and Joseph A. McClain, Jr., Chairman of the American Bar Association's Section of Legal Education and Admissions to the Bar. In addition, numerous speakers discussed topics of specific interest and helpfulness to practicing lawyers in the State.

F. M. McAuliffe, of San Francisco, was elected President to succeed Julius V. Patrosso, of Los Angeles, when the new Board of Governors was organized at the close of the annual meeting. Other members of the Board are Eugene Best, of Riverside; John G. Clock, of Long Beach; and Sidney L. Church, of Salinas, Vice Presidents; Jerry Giesler, Treasurer; Adolphus B. Bianchi, of San Francisco; Frank V. Campbell, of San Jose; Harry M. Conron, of Bakersfield; Carlisle C. Crosby, of Oakland; William A. Glen, of San Diego; Warren E. Libby, of Los Angeles; Harry J. McClean, of Los Angeles; Hale McCowan, of Yreka; A. M. Mulls, Jr., of Sacramento; and Pierce Works, of Los Angeles.

In addition to the regular sessions of the State Bar, there were meetings of the Judicial Council, the Conference of California Judges, the Junior Bar Conference, and the Conference on Patent, Trademark and

Copyright Law, and various panels on topics and problems of especial importance to California lawyers.

State Bar of Michigan Elects Harry G. Gault as President

■ On September 19 Harry G. Gault, of Flint, was elected president of the State Bar of Michigan, succeeding Laurent K. Varnum, of Grand Rapids. The election took place at the time of the annual meeting which featured as speakers Attorney General Tom C. Clark, Senator Alexander Wiley, of Wisconsin, Representative Jesse P. Wolcott, Former Senator Prentiss M. Brown, CIO General Counsel Lee Pressman, and Charles Oliphant, General Counsel of the Bureau of Internal Revenue.

Mr. Gault is entering office as his third term as a member of the Board of Commissioners begins. He was a member of the original committee which drafted the rules governing the State Bar of Michigan at the time of its integration in 1935, and has devoted many strenuous years to Bar affairs. He has served as chairman of the State Bar Committees on Local Bar Associations, Unauthorized Practice of the Law, Legal Publications, etc., and also as president of the Genesee County Bar Association in his home locality. A graduate of the University of Michigan Law School, he began his career at the Bar as an assistant prosecuting attorney in 1917. After serving in World War I, he was elected county prosecutor in 1920. He has risen steadily in leadership in Bar, civic, and political activities since that time.

Other officers elected were Frank H. Boos, of Detroit, first vice president; Carl H. Smith, of Bay City, second vice president; Joseph W. Planck, of Lansing, secretary; and Thomas A. Jacques, of Detroit, re-elected treasurer. Milton E. Bachmann, of Lansing, was continued by the Board of Commissioners as executive secretary.

Oregon State Bar Has All-Time High Attendance

■ A busy three-day meeting, during which many addresses of importance were heard and thirty committee reports were considered and acted upon, was held by the Oregon State Bar at Portland, on September 4-6. President Hugh L. Barzee, of Portland, was in the chair.

HARRY G. GAULT

W. W. BALDERREE

Included among the reports adopted was one which set up a revised advisory schedule of minimum fees. The members of the State Bar also approved the appointment of a special committee to study present State rules pertaining to admission of attorneys to practice and to recommend such changes as it concludes are necessary and desirable for the maintenance and improvement of the standards of admission to the Bar.

As the meeting's registration reached an all-time high of 453, members heard a most useful discussion of community-property law by Alfred Harsh, Professor in the University of Washington Law School. This was welcomed as especially timely in view of the fact that Oregon has recently become a community-property State.

A comprehensive picture of the international situation at the crucial post-war juncture was drawn by Frank E. Holman, of Seattle, Washington, member of the American Bar Association's House of Delegates and its Committee for Peace and Law Through United Nations. He spoke on "The Stubborn Facts of Peace." Ernest Haycox, a well-known Oregon author, presented a layman's point of view in his talk on "A Layman and His Lawyer."

The election of W. W. Balderree, of Grants Pass, to the presidency of the State Bar was announced at the meeting. Other new officers are Lester G. Oehler, of Corvallis, vice president, and B. A. Green, of Portland, treasurer. F. M. Sercombe, Portland, was re-elected secretary.

Philadelphia Bar Association Adopts a Controversial Resolution

■ At a well-attended quarterly meeting on October 7, the Philadelphia Bar Association adopted the following Resolution by a divided vote, on a subject reported in our September issue (page 904) and adverted to incidentally in our October issue (page 998):

> RESOLVED that it is the sense of the Philadelphia Bar Association that a lawyer who is a member in good standing of the Bar of the Supreme Court of Pennsylvania, and who has established his good moral character before the Board of Law Examiners of the county in which he desires to maintain his principal office, has the right to be admitted to the Bar of that county, and should have the right to appear as counsel in any Court of record in any other county in Pennsylvania; provided, however, that a lawyer who has been admitted to the Bar of a particular county and who thereafter desires to maintain an office in another county in which he is not a member of its Bar, should not be admitted to that Bar until he first

JOHN L. WALKER

establishes before the Board of Law Examiners of such county his continued good moral character.

Virginia State Bar Association Gains Highest Membership in its History

■ Associate Justice Robert H. Jackson, of the Supreme Court of the United States, told the story of the formation of the International Military Tribunal and its Charter, and the course of the war crimes trials held in Nuremberg, at the 57th annual meeting of the Virginia State Bar Association, held in Roanoke on August 7 to 9. Having been American Chief Prosecutor during the trials, he spoke on "A Country Lawyer at an International Court".

Thomas B. Gay, retiring President of the State Association and a member of the Board of Editors of the JOURNAL, gave the annual address of the President on "The Right to Work". Among the guest speakers was Walter P. Armstrong, of the Tennessee Bar (Memphis), also a member of the Board of Editors, who gave a delightful talk on "Private" John Allen, a charter member of the American Bar Association (published in our October issue, page 990). Other speakers were F. D. G. Ribble, Dean of the University of Virginia Law School, on "Frontiers in American Constitutional Law", and Frank W. Rogers, of the Virginia Bar (Roanoke), on "Judicial Opinions", before the Judicial Section.

The annual dinner was addressed by John W. Delehant, Judge of the United States District Court of Nebraska, who gave a scholarly and enjoyable portrayal of "Judah P. Benjamin, Lawyer and Statesman".

Reports from the State Association's twenty committees and sections were presented, and resolutions concerning a number of matters of importance to the Bar and public in the State were adopted. A new Special Committee on Taxation was created. During the sessions more than 200 new members were admitted to the Association, which brought its membership above 1400—the largest in the history of the Association.

John L. Walker, of Roanoke, was elected President for the ensuing year. Five sectional Vice Presidents were also chosen: Piedmont—Thomas J. Michie, of Charlottesville; Valley—J. Sloan Kuykendall, of Winchester; Southwest—E. Griffith Dodson, Jr., of Roanoke; Tidewater—Robert G. Cabell, of Richmond; and Southside—C. Carter Lee, of Rockymount. Fred B. Greear, of Norton, and M. Ray Doubles, of Richmond, were elected to the Executive Committee, and William T. Muse, of Richmond, was re-elected as Secretary-Treasurer.

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Independence of the Judicial System

(Continued from page 1089)

stitutional basis under which we live without calling on judges to say what they think those who framed the Constitution ought to have said.

Before the last war I brought back from Germany a copy of a speech delivered by the German Minister of Justice in 1936. After reviewing the duties of a judge as an interpreter of the law in a manner that would be quite unobjectionable from our point of view, he went on to say that above the interests of the subject was a still greater interest—the interest of the state; that the judge had a higher duty than that which he owed to the parties before the Court, and that this was to interpret and apply the law to advance and to protect the interest of the state. The interest of the state was at that time defined by the interest of the Nazi party. That is a doctrine utterly alien to your legal philosophy and mine. I feel all of us who live in democratic countries should critically examine our own institutions to make certain that there is no virus growing within them that will impair the fullest protection of the individual against the exercise of arbitrary power.

Legal Profession Should Not Accept the Withdrawal of Disputes from Judicial Review

I am not sure that the legal profession should accept with tranquility the popular tendency to freely withdraw matters of dispute from judicial review and invest the jurisdiction over the rights of the individual in administrative bodies possessing none of the independence of the judiciary. In some cases this may be quite necessary in the interests of efficiency, but we must be ever mindful of the fact that so-called efficiency has often been the cloak for autocratic power inconsistent with freedom.

Dean Pound, in an admirable introduction to Hayes' book, draws a clear distinction between law and laws, and points out in his inimitable manner that law is ever incompatible with absolute power. "Law is the arch-enemy of autocracy" . . . Laws may exist—indeed they do exist in abundance under absolute political regimes. But not Law" . . . "Law is experience developed by reason and reason tested by experience" *" . . . Law as distinguished from Laws calls for Judges."* Any officer of government who is clothed with judicial or quasi-judicial power and exercises his authority in the interests of the state that employs him, or any other interest, is forging a weapon of dictatorial power. He may have no desire or intention of using it as such,

but others may follow him who will so use it.

You in the United States have worked out in some measure a system of control of administrative process and judicial review of administrative decisions. In Canada, public and legal opinion have not been so well crystallized as they have been here. Whatever may be the means adopted, it is inherent in democracy itself that everyone who owes allegience to any other than the divine Goddess of Justice should be subject to the ultimate control of an independent judiciary.

Individual Rights Depend on a Judiciary That Is Independent in Fact

The foundation of your Nation rests on the declaration of the rights of the individual as a free man. The right to live under the rule of law administered by an independent judiciary is one of the lamps of freedom. The legal profession must keep that lamp trimmed and burning bright in every democratic country. During the past generation we have seen many of the lamps of freedom go out throughout the world. Young men of the allied countries fought with unprecedented courage to light those lamps again. Examine a map of the world today and contemplate the small percentage of population that enjoys the protection of a judiciary absolutely free to act independently of executive or legislative power. Human beings who live in society have a right to live under law made for them by constitutional process deriving its ultimate authority from the people. Once the law is made or declared, the right of free men is that it be administered for and applied to all the people without discrimination in any degree, by a judiciary that is not only free and independent in fact but also thinks and acts with freedom and independence.

Lawyers Should Work for Judicial Settlement of International Disputes

May I conclude with one word to raise our range of vision of law and government to reach beyond the national horizon, may I express the hope that the joint influence of your Association and ours may be so brought to bear on the development of human affairs in this world that foundations may be soon laid on which will rise a temple of justice for the judicial settlement of all international disputes? The worshippers at the shrine of justice know no racial distinction, and their Goddess acknowledges no international boundaries. The only hope for the future lies in the development in the hearts of the people of the world of such a sense of justice that they will willingly submit to government by law and under law. The cynic says this is a fanciful dream. A United States of America living in peace under the rule of law was 300 short years ago a dream beyond the imagination of the most fanciful.

Is it too much to hope that the devoted disciples of the law here assembled, representing as we do the legal profession of the entire North American continent, can if we will, by our combined effort, give leadership to the thinking of the world so that civilization may be saved from the abyss of certain destruction?

7

Crisis in Foreign Policy

(Continued from page 1092)

House had instructed the Committee to make a study and report. As the final form of the ITO Charter will not be determined until a further Conference in Havana, Cuba, on November 21, the Committee reported that present action by the House "would plainly be premature" if it did more than to "call the attention of the profession and the public to the importance of the subject, recommend a careful study of the Charter when copies of it are available, and declare in favor of its being submitted for the advice and consent of the Senate as to its ratification as a treaty, and for action upon it also by the House of Representatives, for reasons indicated in our submitted Resolution". The Committee added that "Because of their large relationship to tariffs, revenues, and other fiscal matters, as well as their probable legislative consequences, the projected provisions of the Charter appear to be such as to come within the intent and practice under the Constitution that the House of Representatives shall act as to such matters".

This recommendation led to questions and some discussion. Question was raised as to whether the Charter should not be dealt with only as a treaty. Chairman Ransom explained that the original proposals had evidently contemplated that the ITO Charter should not be submitted as a treaty at all. The Committee felt that the traditional functions of both houses of the Congress should be preserved and fulfilled, as to matters which might so vitally affect the economic system and institutions of the United States.

A few negative votes were heard when the House of Delegates adopted the following Resolution:

> RESOLVED, That the American Bar Association expresses the keen interest of its members in the proposed International Trade Organization and its proposed Charter, to be given final form and approval at a Conference to convene in Havana, Cuba, on November 21; and the Association recommends that when copies of the proposed Organization and Charter become available, the same should be studied carefully and thoroughly by the Congress and the people of the United States, and also reported on to the House of Delegates by the Section of International and Comparative Law, the Committee on Commerce, and the Committee for Peace and Law Through United Nations, as hitherto directed by the House.
>
> RESOLVED FURTHER, That the American Bar Association is of the opinion that if the final form of the Organization and Charter would place binding obligations on its Members, the membership of the United States

7 Crisis in Foreign Policy

in the Organization and Charter should become effective only when the same are submitted by The President and ratified with the advice and consent of the Senate, as a Treaty; and in view of the effect of prospective provisions upon American tariffs, reciprocal arrangements, and financial obligations, only when approved also by the House of Representatives of the United States.

Resolution No. 6: As to the Foreign Policy of the United States

The Committee submitted the following comprehensive Resolutions as to foreign policy:

> RESOLVED, That the American Bar Association is of the opinion that the foreign policy of the United States should continue to be in all respects developed, decided and unitedly supported, without division on party lines or regard for differences on other issues; and that the members of the Association should to that end cooperate in bringing about in their respective communities informative public discussions of all questions entering into the foreign policy of our country, and should take the lead in behalf of an informed and united support of that policy.
>
> RESOLVED FURTHER, That the American Bar Association endorses and supports the action of the Government of the United States in giving assistance to the Government of Greece, in the exercise of the right of the United States under Article 51 of the Charter to take individual and collective action in defending against an armed attack upon a Member of the United Nations.
>
> RESOLVED FURTHER, That the American Bar Association endorses and supports in principle the proposal of the Government of the United States that the Nations of Europe which need financial and other assistance from the United States in the restoration of their economy and the maintenance of their governments against aggressions and infiltrations shall first mobilize their own resources in helping themselves and each other and shall establish their own organized means of cooperating with each other for the removal of trade barriers and for the maintenance of united action by themselves against aggression and propaganda from outside their borders; and that the extent of the financial needs of such Nations and the extent of their cooperation in such a policy shall be ascertained and made known, before the United States undertakes commitments.

"In the opinion of a majority of your Committee," the Report said, "the 'Marshall Plan' has not yet at this writing been given sufficiently definite and particularized form to enable or warrant a declaration approving it as such and by name. . . . Resolutions which declare and endorse the vital principles may serve this purpose better than an endorsement by name of a plan which has not yet been published in a definitive form".

Again urging that the Nations of non-Communist Europe should "first organize", under Article 54 of the Charter or otherwise, to defend and "help themselves and each other", the Report said:

> Our final Resolution as to foreign policy proposes to declare support for stated basic principles which are believed to be fundamental for a soundly-conceived plan for the economic rehabilitation of the shattered economy of Europe, for our own protection against aggressions and infiltrations which might otherwise come so near our shores and "region" as to menace all Nations of the Americas. The basic principle underlying American assistance in money, food, farm equipment, fertilizer, and other essentials of a free economy, shall be that the free Nations of Europe shall first organize and cooperate to help themselves and each other, on the hard road back to stability, independence, solvency and peace.

The recommended Resolutions were adopted by the House, without a division. The House also authorized the transmittal of copies of the foregoing resolutions, "to officials and committees of the United Nations, to officers of the Government of the United States, to members of the Senate and House of Representatives, and to other Associations and organizations with which this Association is cooperating, including all organizations represented in the House of Delegates". Copies of the full Report of the Committee may be obtained from Association Headquarters. The Committee's Report closed by calling attention to "the need that lawyers everywhere shall do all they can to aid the development of public understanding of the issues involved and an informed public opinion in support of our country's policy in foreign affairs."

9 "Judging Is Also Administration"

(Continued from page 1102)

a high percentage might suggest a possible abuse of its own discretion, by the Court, in unduly restricting access to it. However, a unique practice of the Court, fully explained to Congress, has provided an excellent safeguard against such a possibility. This safeguard is the practice of the Court to grant any such petition upon the favorable vote of a substantial minority—that is, four out of nine—of the members of the Court rather than to require the favorable vote of a majority. Unless at least a substantial minority of the Court believes that the case should be heard, it seems clear that it should not be. On the other hand, if a substantial minority of the members of the Court feels that it should be heard, the Court, as a whole, hears it and passes upon the issue it presents.[23]

The Act of 1925 had the hoped-for results. From the time its full effect was felt, the Court has been current with its business. At the close of the October Term, 1929, which was presided over in turn by

orari] were denied on the merits; at the 1938 term, 666. The 155 petitions granted at the 1937 term were 17.7% of the total filed; the 130 at the 1938 term, 16%. Like percentages have maintained themselves with singular consistency since prior to the enlargement of discretionary jurisdiction under the Act of 1925. The percentage of petitions granted during the sixteen terms since that of 1923 is 18.1%; the term-by-term figures disclose no sustained trend either upward or downward." Hart: "The Business of the Supreme Court at the October Terms, 1937 and 1938"; 53 *Harv. L. Rev.* 579, 585. In the foregoing quotation "denied on the merits" means denied on the merits of the petition for certiorari, as distinguished, for example, from a denial because of untimeliness. It does not mean denied on the merits of the case.

The docket of the Supreme Court for its October 1946 term shows: petitions for certiorari acted upon (exclusive of those filed *In Forma Pauperis*) 733; of which 148, or about 20.2 per cent were granted. The 529 additional cases, treated as petitions for certiorari, but filed *In Forma Pauperis* included the many requests for review received from penitentiary inmates. Only eight of these 529 "petitions," were found to justify the granting of them. To include these "petitions" would produce a misleading total

Chief Justice Taft, Mr. Justice Holmes and Chief Justice Hughes, the Court made the official entry that it had disposed of all cases submitted to it and all business before the Court at that term.[24] Of its October Term, 1930, it has been stated that "on any basis of comparison the Court cleared its docket more than at any time during the last hundred years."[25] Of its October Term, 1932, it is said:

> In effect, for the first time since the early years of its institution, the Court is hearing and disposing of all litigation brought before it without delay and without sacrifice of any of the guarantees of ample argument and due deliberation which the effective exercise of its functions demand. In so doing, it sets a standard for state courts of last resort throughout the country.[26]

That Act was born of judicial experience. It was written into law and put into operation under the leadership of Chief Justice Taft. The high standards of judicial administration which it made possible have been maintained to this day.

3. *The Building and Equipment of the Supreme Court Building*

From its earliest days, the Supreme Court, its library and its staff were handicapped by lack of adequate space and facilities. A "build-

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of 1262 petitions for certiorari acted upon of which 156, or only 12.4 per cent were granted. To avoid this confusion, a change in practice is being put into effect whereby these informal requests will be placed on the Miscellaneous Docket and will be transferred to the General Docket only when and if granted.

"The jurisdiction [of the Supreme Court to review cases by granting a writ of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." Taft, C. J., in *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

"I think that it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 per cent or so in addition which have a fair degree of plausibility, but which fail to survive a critical examination. The remainder, falling short, I believe, of 20 per cent, show substantial grounds and are granted. I think that [it] is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality." Hughes, C. J., in a letter to Senator Burton K. Wheeler, March 23, 1937, reprinted in 81 Cong. Rec. 2814-2815 (1937).

23. "For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered." Mr. Justice Van Devanter testifying before a Subcommittee of the Committee on the Judiciary of the Senate on S. 2060 and 2061, 68th Cong., 1st Sess. 29 (1924).

See also, statements by Justices Van Devanter and Brandeis on Hearings before Senate Committee on the Judiciary on S. 2176, 74th Cong., 1st Sess. 9-10 (1935).

"In all matters before the Court, except in the mere routine of administration, all the Justices—unless for some reason a Justice is disqualified or unable to act in a particular case—participate in the decision. This applies to the grant or refusal of petitions for certiorari, which are granted if four Justices think they should be. A vote by a majority is not required in such cases. Even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote." Hughes, C. J., in a letter to Senator Burton K. Wheeler, March 23 ,1937, reprinted in 81 Cong. Rec. 2814 (1937).

"But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided." Stone, C. J., in *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 359.

That three votes were not sufficient to grant, see *Scarborough* v. *Pennsylvania R. Co.*, 326 U. S. 755; *Helvering* v. *Sprouse*, 315 U. S. 810; and *Simmons* v. *Peavy-Welsh Lumber Co.*, 311 U. S. 685. And see Boskey: "Mechanics of the Supreme Court's Certiorari Jurisdiction," 46 *Col. L. Rev.* 255, 257.

24. "All cases submitted, and all business before the Court, at this term, having been disposed of,

"It is now here ordered by this Court that all cases on the docket be, and they are hereby, continued to the next term." (1929) Sup. Ct. J. 311.

"At the last term the Court disposed of every case that was ripe for decision. For the first time in many years no case that had been submitted was allowed to go over." Frankfurter and Landis, The Business of the Supreme Court at October Term, 1929, 44 *Harv. L. Rev.* 1, 2.

"The Supreme Court is fully abreast of its work. . . .

". . . We shall be able to hear all these cases [twenty-eight awaiting argument March 23, 1937], and such others as may come up for argument, before our adjournment for the term. There is no congestion of cases upon our calendar.

"This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard." Hughes, C. J., in a letter to Senator Burton K. Wheeler, March 23, 1937, reprinted in 81 Cong. Rec. 2814 (1937). This letter also tabulates the case load for O. T. 1930-O. T. 1935.

25. Frankfurter and Landis: "The Business of the Supreme Court at October Term, 1930"; 45 *Harv. L. Rev.* 271, 274.

26. Frankfurter and Hart: "The Business of the Supreme Court at October Term, 1932"; 47 *Harv. L. Rev.* 245, 249.

In the proceedings held in the Supreme Court in memory of Chief Justice Taft, on June 1, 1931, Chief Justice Hughes said:

"Deeply concerned with improvements in administration, the Chief Justice gave special attention to his own duty as administrator. Even the distinction of his contribution to the jurisprudence of the Court does not obscure, but throws into a stronger light, by reason of his versatility, his preëminence in the executive department of its work. In the successful endeavor to end the delays which bring such a deserved reproach upon judicial procedure, he was ever a leader, and he would have been the first to recognize the able support which he received from his colleagues in this effort. It was not a vain attempt to bring the Court up to its work by a spasmodic activity, but the intelligent formulation of a plan which, receiving the sanction of Congress, has put the Court, we trust permanently, upon a basis by which it can keep abreast of the demands upon it. So long as we follow the example which he has set and avail ourselves of the opportunity which his leadership provided, the delays of justice will have no countenance or illustration here.

"But the Chief Justice was not content with expediting the work of this Court. He felt a special responsibility with respect to the entire Federal judicial system. Many years before he came to this bench, he had suggested that either the Supreme Court or the Chief Justice should have an adequate executive force to keep current watch upon the business awaiting dispatch in all the districts and circuits of the United States and to make a periodical estimate of the number of judges needed in the various districts and to make the requisite assignments. In a different manner, it was sought to attain the object he had in view by the establishment, in 1922, through his persistence, of the Judicial Conference of the Senior Circuit Judges, held annually, at which the Chief Justice of this Court presides, and which considers the needs of judicial service in the different districts and makes recommendations accordingly. This is an instrumentality of great value, and what it has accomplished and the promise of what it may achieve are due in the largest measure to the foresight and intelligent guidance of Chief Justice Taft." 285 U. S. XXXIV-XXXV.

ing for the Judiciary" was among the recommendations of a Committee of the House of Representatives in 1796 and the original plans for the Capitol included no room for the Court. However, for about 135 years, no "building for the Judiciary" was built and, during that time, the Court was housed in space temporarily assigned to it in the Capitol. During its first eight years, the Court met in a small room, 24 feet wide by 30 feet long, which was then known as the Senate Clerk's office. Later, during most of Chief Justice Marshall's service, the Court met in a room in the basement beneath the then Senate Chamber. The space for its library and its Clerk was inadequate and the Justices maintained their chambers in their respective homes. In 1860, when the Senate moved into its new wing of the Capitol, the Court was moved upstairs to the original Senate Chamber.[27] This provided a hearing room to which the Court became greatly attached. Its former courtroom was used for a law library. However, as time went on, the increasing business of the Court far out-grew the space allotted to its Clerk, its Marshal, its Justices and the members of its Bar.

Again Chief Justice Taft took the lead. This time he induced Congress to see the appropriateness of providing the Supreme Court with facilities comparable to those of the legislative and executive branches of the Government and reasonably adapted to the needs of the future. The purchase of a site opposite the Capitol was authorized in 1926.[28] The United States Supreme Court Building Commission was created in 1928.[29] Chief Justice Hughes, succeeding Chief Justice Taft as Chairman of the Building Commission, was able not only to secure completion of the building in time to use it throughout the October Term, 1935, but to do so for nearly ten per cent less than the sum appropriated.[30]

Today not only does the simple majesty of the Supreme Court Building inspire the members of the Court and the public, but its facilities have increased the efficiency of the Court. The building houses not only the courtroom, the law library, the Clerk's office and the Marshal's office, but also the Justices' chambers, the Justices' library, conference rooms for the Judicial Conference of Senior Circuit Court Judges and other appropriate bodies, rooms for the Attorney General, the Solicitor General and members of the Bar, rooms for the court reporter and his staff, a print shop for the printing of opinions, the Administrative Office of the United States Courts, and a cafeteria for the visiting public as well as the employees. As a result, the Court has substantially adequate physical facilities and seeks to render services worthy of them.

4. *The Federal Rules of Civil Procedure*

Having thus put its own house in order, the Supreme Court, under the leadership of Chief Justice Hughes and of the Judicial Conference of Senior Circuit Judges, undertook to meet the long-felt need for generally simplified federal Court procedure. In 1914, seven years before William Howard Taft became Chief Justice, he had coupled his advocacy of simplified procedure with his advocacy of a Judicial Conference.[31] Chief Justice Hughes had a like interest in this subject. With the support of the American Bar Association, legislation was secured which authorized the Supreme Court "to prescribe, by general rules, for the district courts of the United States and for the Courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." It expressly provided also that "The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: . . . ."[32] Under this authority, an

27. 1 Warren: *The Supreme Court in United States History* (1935) 169-171; II Warren (1937) 362.

28. Acquisition of site authorized, Act of May 25, 1926, 44 Stat. 630; appropriation of $1,500,000 approved, Act of February 28, 1927, 44 Stat. 1254; increased by $268,741, Act of March 4, 1929, 45 Stat. 1614. The acquisition of land was completed November 25, 1929, the largest parcel being that purchased from the National Woman's Party, often referred to as the Little Brick Capitol, which had been used for meetings of Congress after the British had burned the Capitol in 1814. Final Report of the United States Supreme Court Building Commission, Sen. Doc. No. 88, 76th Cong., 1st Sess. 1-2 (1939).

29. The United States Supreme Court Building Commission originally consisted of: Chairman: Hon. William Howard Taft, Chief Justice of the United States. Members: Hon. Willis Van Devanter, Associate Justice of the Supreme Court of the United States; Hon. Henry W. Keyes, chairman of the Senate Committee on Public Buildings and Grounds; Hon. James A. Reed, ranking minority member of the Senate Committee on Public Buildings and Grounds; Hon. Richard N. Elliott, chairman of the House Committee on Public Buildings and Grounds; Hon. Fritz G. Lanham, ranking minority member of the House Committee on Public Buildings and Grounds; Hon. David Lynn, Architect of the Capitol. At the conclusion of its service, it consisted of: Chairman: Hon. Charles Evans Hughes, Chief Justice of the United States. Members: Hon. Willis Van Devanter, Associate Justice (retired); Hon. Tom Connally, Senator from Texas; Hon. James A. Reed, former Senator from Missouri; Hon. Richard N. Elliott, former Representative from Indiana; Hon. Fritz G. Lanham, Representative from Texas. Member and executive officer: Hon. David Lynn, Architect of the Capitol. Final Report of the United States Supreme Court Building Commission, Sen. Doc. No. 88, 76th Cong. 1st Sess. 4 (1939).

30. Appropriation for building and grounds, including furniture, furnishings and equipment. . $9,740,000.00
Expended for building, treatment of grounds, furniture, furnishings and equipment. . 9,646,467.98
Unexpended and unobligated balance June 6, 1939. . . . . $93,532.02
Final Report of the United States Supreme Court Building Commission, Sen. Doc. No. 88, 76th Cong., 1st Sess. 21 (1939).

31. Address at Cincinnati Law School Commencement, May 23, 1941, 5 *Ky. L. J.* 1, 14. See also, his recommendation of uniform federal rules of practice, both in law and equity, made as Chief Justice, in the Hearings before the Senate Committee on the Judiciary on S. 2432, 2433 and 2523, 67th Cong., 1st Sess. 16-17 (1921).

32. Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. §§ 723b, 723c.

33. The Advisory Committee appointed by the Supreme Court to assist it in drafting a unified system of Equity and Law Rules and to serve without compensation consisted of: William D. Mitchell, of New York City, Chairman; Scott M. Loftin of Jacksonville, Florida, President of the American Bar Association; George W. Wickersham, of New York City, President of the American Law Institute; Wilbur H. Cherry, of Minneapolis, Minnesota, Professor of Law at the University of Minnesota; Charles E. Clark, of New Haven, Connecticut, Dean of the Law School of Yale University; Armistead M. Dobie, of University, Virginia, Dean of the Law School of the University of Virginia; Robert G. Dodge, of Boston, Massachusetts; George Donworth, of Seattle, Washington; Joseph G. Gamble, of Des Moines, Iowa; Monte M. Lemann, of New Orleans, Louisiana; Edmund M. Morgan, of Cambridge, Massachusetts, Professor of Law at Harvard University; Warren Olney, Jr., of San Francisco, California; Edson R. Sunderland, of Ann Arbor, Michigan, Professor of Law at the University of Michigan; and Edgar B. Tolman, of Chicago, Illinois. Charles E. Clark was appointed Reporter to the Advisory Committee. 295 U. S. 774-775.

outstanding Advisory Committee was appointed by the Supreme Court.[33] Its service was competent and diligent. Through several publications of its preliminary drafts and comments, it forestalled as many errors and ambiguities as it could. Following the Committee's Final Report, the Supreme Court adopted the new Federal Rules of Civil Procedure December 20, 1937, and these became effective September 16, 1938.[34] This procedure led to similar action which produced the new Federal Rules of Criminal Procedure, effective March 21, 1946.[35]

5. The Administrative Office of the United States Courts

There still remained to be taken the unprecedented but essential step of providing the federal courts with a business administration of their affairs without undue interference with their independence.

Without the Judicial Conference of Senior Circuit Judges and the coordination of the administration of the federal courts resulting from it, this step would have been inconceivable. However, when the members of the Conference became convinced of the desirability of a coordinated federal judiciary, the Administrative Office of the United States Courts was but a natural implementation of the idea.

By the Act of August 7, 1939, Congress gave the necessary authority.[36] The Supreme Court appointed Henry P. Chandler Director and Elmore Whitehurst Assistant Director.[37] The Administrative Office has proved its value many times over—not only to the Chief Justice of the United States, the Supreme Court and the Judicial Conference of Senior Circuit Judges but to the Circuit Courts of Appeals, the District Courts, the Special Courts, the Department of Justice and to Congress. For the first time, authoritative judicial statistics are available, supervision is given to every financial responsibility of the federal courts, efficiency is gained in securing quarters and equipment, technical assistance is available for the supervision of developments in administrative activities such as those of official reporters, bankruptcy referees, U. S. Commissioners and probation officers. The Administrative Office is now an integral part of the federal judicial system and it has a flexibility that will permit it to meet the demands of the future.

As a result of the constructive leadership in judicial administration that has been described, our federal courts today are coordinated, the Supreme Court Docket is current, the Supreme Court is adequately housed and equipped, simplified Federal Rules of Civil and Criminal Procedure are in effect and a permanent Administrative Office for the Courts of the United States is in operation.

The eyes of the world watch each test of the constitutional structure of the United States. The keystone of that structure is its independent judiciary. It remains for that judiciary to fit its actions so perfectly to the needs of each opportunity that they will strengthen the case for a government of laws as the best guaranty of human liberty.

34. Notes were published with the Committee's Preliminary Draft of May, 1936. They were revised and published with the Committee's Report of April, 1937, and revised again to conform to the Committee's Final Report of November, 1937, and to the Rules as approved by the Supreme Court, December 20, 1937. Federal Rules of Civil Procedure 215. These Rules were reported to Congress by the Attorney General, January 3, 1938, and took effect on September 16, 1938, three months after adjournment of the second regular session of the 75th Congress on June 16, 1938. See Rule 86 and 52 Stat. 1451. 308 U. S. 645-788, 28 U. S. C. fol. § 723c.

Rule 81 (a) (6) was amended December 28, 1939, 308 U. S. 642, 28 U. S. C. fol. § 723c. See also, amendments adopted by the Supreme Court December 27, 1946, and reported to Congress by the Attorney General January 2, 1947, 16 S. Ct. *Digest* (1947 Cum. 5).

35. The Supreme Court was authorized by the Act of June 29, 1940, 54 Stat. 688, 18 U. S. C. § 687, to prescribe new Federal Rules of Criminal Procedure for the District Courts of the United States. On February 3, 1941, the Court appointed the following Advisory Committee on Rules in Criminal Cases to serve without compensation: Arthur T. Vanderbilt, Newark, New Jersey, Chairman; James J. Robinson, Professor of Law at the Indiana University Law School, Reporter; Alexander Holtzoff, Washington, D. C., Secretary; Newman F. Baker, Professor of Law at the Northwestern University Law School; George James Burke, Ann Arbor, Michigan; John J. Burns, Boston Massachusetts; Frederick E. Crane, New York City; Gordon Dean, Washington, D. C.; George H. Dession, Professor of Law at the Yale Law School; Sheldon Glueck, Professor of Law at the Harvard Law School; George Z. Medalie, New York City; Lester B. Orfield, Professor of Law at the University of Nebraska Law School; Murray Seasongood, Cincinnati, Ohio; J. O. Seth, Santa Fe, New Mexico; John B. Waite, Professor of Law at the University of Michigan Law School; Herbert Wechsler, Professor of Law at the Columbia Law School; and G. Aaron Youngquist, Minneapolis, Minnesota. 312 U. S. 717-718.

After the consideration of several drafts, the Supreme Court, on December 26, 1944, prescribed the new Rules. 323 U. S. 821. These were filed with Congress January 3, 1945, and took effect March 21, 1946, three months after the adjournment of the first regular session of the 79th Congress on December 21, 1945. See Rule 59 and 59 Stat. 849. 327 U. S. 821, 18 U. S. C. A. fol. § 687, 1946 Pocket Part 205.

36. Chapter XV, entitled "The Administration of the United States Courts," was added to the Judicial Code by the Act of August 7, 1939, effective November 6, 1939, 53 Stat. 1223, 28 U. S. C. §§ 444-450.

37. 308 U.S. 642, 641.

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No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and absence of iteration or undue prolixity will be taken into favorable consideration.

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